Supreme Court, U.S.
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No. 08-

IN THE
Supreme Court of the United States

METROPOLITAN GOVERNMENT
OF NASHVILLE & DAVIDSON COUNTY,

Petitioner,

v.

BRIAN PETTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SUE B. CAIN
Director of Law
JAMES L. CHARLES
Associate Director of Law
KEVIN C. KLEIN*
Assistant Metropolitan Attorney
DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
TENNESSEE
P.O. Box 196300
108 Metropolitan Courthouse
Nashville, Tennessee 37219-6300
(615) 862-6341

* *Counsel of Record* — *Attorneys for Petitioner*

220512

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Sixth Circuit held that the public's right to a qualified police force is subordinate to a returning veteran's right to reemployment. More broadly, the Court held that the Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-4334, prohibits employers from taking steps to ensure that returning veterans are qualified to resume their jobs before returning them to work.

Respectfully, the Court of Appeals erred in its interpretation of USERRA, and its decision has the potential to endanger the public. Because this case raises exceptionally important issues, the Metropolitan Government requests plenary review. Specifically, the Metropolitan Government raises the following issues:

1. Whether the Sixth Circuit erred in holding that USERRA prohibits employers – even employers in safety-sensitive fields like local law enforcement – from taking steps to ensure that returning veterans are qualified to resume their jobs before returning them to work?

2. Whether a returning veteran is "qualified" for a particular position if he or she is physically capable of performing the applicable job duties, as the Sixth Circuit held in the instant case, or whether "qualified" means mentally, physically, and temperamentally capable of performing the essential job functions, as the United States Courts of Appeals for the First and Second Circuits have held?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

Parties to the Proceeding Below

Petitioner: The Metropolitan Government of Nashville and Davidson County, Tennessee is the sole Petitioner herein. The Metropolitan Government was the Defendant in the underlying lawsuit and the Appellee at the United States Court of Appeals for the Sixth Circuit.

Respondent: Brian Petty is the sole Respondent herein. Mr. Petty was the Plaintiff in the underlying lawsuit and the Appellant at the United States Court of Appeals for the Sixth Circuit.

Rule 29.6 Statement

Because the Petitioner herein is a governmental entity, Supreme Court Rule 29.6 does not require any disclosure.

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OPINIONS BELOW

On August 18, 2008, the United States Court of Appeals for the Sixth Circuit (1) reversed the District Court's Order entering summary judgment for the Metropolitan Government on Brian Petty's failure to reemploy claim; (2) directed the District Court to enter summary judgment for Petty on his failure to reemploy claim; and (3) vacated the District Court's entry of judgment in the Metropolitan Government's favor on Petty's discrimination claim. The Sixth Circuit's opinion is officially reported at 538 F.3d 431 (6th Cir. 2008). Additionally, the Sixth Circuit's opinion is attached hereto at App. A, 1a-36a.

On May 22, 2007, Petty's discrimination claim went to trial in the United States District Court for the Middle District of Tennessee. At the conclusion of Petty's proof, the District Court entered judgment in favor of the Metropolitan Government pursuant to Fed. R. Civ. P. 52(c). The District Court's Memorandum Opinion and Order, entered on May 23, 2007, is attached hereto at App. B, 37a-41a.

On November 16, 2006, the District Court entered its Memorandum Opinion and Order granting, in part, the Metropolitan Government's motion for summary judgment, and denying Petty's motion for summary judgment. The District Court's November 16, 2006 Memorandum Opinion and Order is unofficially reported at 2006 WL 3333509 (M.D. Tenn.). It is also attached hereto at App. C, 42a-74a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion on August 18, 2008. The Metropolitan Government timely filed a Petition for Rehearing *En Banc* on September 2, 2008. On October 30, 2008, the Sixth Circuit denied the Metropolitan Government's Petition for Rehearing *En Banc*. The Sixth Circuit's October 30th Order denying the Metropolitan Government's Petition for Rehearing *En Banc* is attached hereto at App. D, 75a-76a.

This Petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of entry of the opinion and judgment that the Metropolitan Government seeks to have reviewed. This Court has jurisdiction to review the Sixth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 38 U.S.C. §§ 4312 and 4313. In relevant part, Section 4312 states:

> **4312. Reemployment rights of persons who serve in the uniformed services**
>
> (a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

* * *

(e)(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is

impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

* * *

(f)(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—

(A) the person's application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

Id.

In relevant part, 38 U.S.C. § 4313 provides:

4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and section 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

* * *

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted

by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

* * *

(4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with

> reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

Id.

STATEMENT OF THE CASE

This action arises out of Brian Petty's employment as a Metropolitan Police Officer, his service in the U.S. Army Reserves, and his efforts to return to the Police Department after being "discharged in lieu of trial by court martial." By way of background, in October 2003, Petty, a Sergeant with the Metropolitan Police Department, was mobilized as part of Operation Iraqi Freedom. *Petty*, 538 F.3d at 433. He was sent to Chattanooga, Tennessee; then to Ft. Stewart, Georgia; and finally, to Camp Navistar / Big Sky Oasis in Kuwait. *Id.* at 433-34.

Because Kuwait is predominantly a Muslim country, U.S. Central Command General Order 1A prohibits soldiers from possessing or consuming alcohol at Camp Navistar / Big Sky Oasis. Petty violated this rule, among others, and as a result, he was charged with multiple violations of the Uniform Military Code of Justice. *Petty*, 538 F.3d at 435. Specifically, Petty was charged with (1) violation of a lawful order, and (2) conduct unbecoming an officer. These charges stemmed from a health and welfare inspection that revealed that Petty, a Captain and unit commander, was manufacturing and consuming alcohol, and providing alcohol to an enlisted soldier. *Id.*

In January 2005, Petty resigned from the U.S. Army Reserves "for the good of the service." *Petty*, 538 F.3d at 435. On February 28, 2005, Petty visited the Police Department to request reinstatement. *Id.* at 436. At the time, the Police Department had a return-to-work process for all officers who had been away from the Department for an extended period. As part of the return-to-work process, Petty was required to fill out a personal history update. On this personal history update, Petty disclosed that he had faced charges in the military; however, he did not disclose that he had been charged with conduct unbecoming an officer, or that the charges stemmed, in part, from his providing alcohol to an enlisted soldier. Furthermore, Petty claimed that he had alcohol in his quarters because he was asked to obtain alcohol for a legitimate military purpose.[1] *Id.*

Based upon the disclosures and the omissions in Petty's narrative history statement, the Police Department was concerned about his fitness to serve as a police officer. Accordingly, on March 21, 2005, the Police Department returned Petty to work, but in a capacity in which he did not exercise full police powers. *Petty*, 538 F.3d at 436. Petty was paid as a sergeant on patrol, but he was assigned to an office job while the Police Department's Office of Professional Accountability ("OPA") investigated the matter.

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1. The Metropolitan Government later located the individual Petty claimed asked him to obtain alcohol, Command Sergeant Major Thomas Seuberling. In opposition to Petty's motion for summary judgment and in support of its motion for summary judgment, the Metropolitan Government submitted an affidavit executed by CSM Seuberling in which he denied ever asking Petty to procure alcohol. *Petty*, 538 F.3d at 435 n.1 (*quoting Petty*, 2006 WL 33333509, at *2 n.1).

Initially, OPA closed its investigation into Petty's conduct, concluding that his omissions may have been unintentional. Subsequently, however, the Police Department determined that, in addition to omitting information on his narrative history statement, Petty had provided the Police Department with an altered copy of his DD-214.[2] *Petty*, 538 F.3d at 437. Specifically, the copy that Petty provided to the Police Department did not include the following language from the bottom of the form: "**Narrative Reason for Separation: In lieu of trial by court martial.**" *Id.* (emphasis added). With this additional information, the Police Department declined to return Petty to service as a patrol sergeant pending further investigation and a determination as to whether disciplinary action was warranted.[3] *Id.* at 438.

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2. A DD-214 is the standard document that the United States Military provides to indicate the terms of an individual's discharge.

3. After a full investigation into Petty's conduct by OPA, the Police Department terminated Petty's employment in December 2007. *Petty*, 538 F.3d at 436 n.7. The Court of Appeals faulted the Metropolitan Government for the duration of OPA's investigation, stating: "Metro cannot defeat the 'prompt reemployment' guarantee of § 4313 by engaging in never-ending investigations into Petty's qualifications." *Petty*, 538 F.3d at 431. In so doing, the Court made a conclusion contrary to the only proof presented on this issue, that *Petty caused the delay*. *See* Appellee's Brief, p. 18 n.4. For example, OPA scheduled a meeting with Petty for October 25, 2005, but Petty's counsel responded indicating that he would not be available until late-December 2005. *See* Appellee's Brief, p. 18 n.4 (*citing* Trial Record at 183:14-22). After the December 2005 meeting, the next step was for Petty to take a Computer Voice Stress Analysis ("CVSA"). The CVSA was scheduled for January 2006, but Petty, through his attorneys, requested that the CVSA be delayed. (Cont'd)

In September 2005, Petty sued the Metropolitan Government alleging that the Police Department had violated the Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-4334. *Petty*, 538 F.3d at 438. Specifically, Petty alleged that the Police Department (1) unlawfully failed to return him to work as a patrol sergeant and (2) discriminated against him on the basis of his military status by refusing to return him to work as a patrol sergeant, and by refusing to allow him to work an "extra-duty" job as a security officer at a local restaurant and bar. *Id.* In March 2006, Petty amended his complaint to allege that the Police Department had retaliated against him for filing a lawsuit asserting USERRA claims.

(Cont'd)

See Appellee's Brief, p. 18 n.4 (*citing* Trial Record at 183:23-184:6). The CVSA was rescheduled for March 2006, but Petty, through his attorneys, threatened to file a request for injunctive relief if the CVSA went forward. *See* Appellee's Brief, p. 18 n.4 (*citing* Trial Record at 184:7-18). In December 2006, after the District Court granted, in part, the Metropolitan Government's motion for summary judgment, OPA again contacted Petty to schedule a CVSA. *See* Appellee's Brief, p. 18 n.4 (*citing* Trial Record at 184:24-185:6). Again, Petty requested that the CVSA be postponed. *Id.* Ultimately, the CVSA was administered in April 2007. *Id.* OPA then closed its investigation, and the Police Department initiated termination proceedings against Petty.

Given Petty's delay, the Police Department's concerns about his truthfulness, and the fact that the Department employed Petty throughout OPA's investigation, the Department's actions were reasonable.

The parties filed cross-motions for summary judgment. *Petty*, 538 F.3d at 438. The District Court granted, in part, the Metropolitan Government's motion for summary judgment, thereby dismissing the bulk of Petty's claims, and denied Petty's motion. The only claim that remained was Petty's claim that the Police Department discriminated against him by denying his request to engage in "extra-duty" employment. That claim went to trial, and at the conclusion of Petty's proof, the District Court entered judgment in favor of the Metropolitan Government pursuant to Fed. R. Civ. P. 52(c). *Id.*

Petty appealed to the United States Court of Appeals for the Sixth Circuit. On appeal, the Sixth Circuit (1) reversed the District Court's Order granting summary judgment for the Metropolitan Government on Petty's failure to reemploy claim; (2) directed the District Court to enter summary judgment in Petty's favor on his failure to reemploy claim; and (3) vacated the District Court's entry of judgment in favor of the Metropolitan Government on Petty's discrimination claim. *Petty*, 538 F.3d at 448.

This Petition for Writ of Certiorari focuses on the Sixth Circuit's resolution of Petty's failure to reemploy claim. In reversing summary judgment for the Metropolitan Government and directing entry of summary judgment for Petty, the Sixth Circuit held that USERRA prohibits the Police Department from implementing a return-to-work process to determine whether individuals returning from military leave are qualified to return to service as police officers. *Petty*, 538 F.3d at 441-42. Furthermore, after holding that

USERRA prohibits any inquiry into a returning veteran's qualifications, the Sixth Circuit held that because the Police Department did not challenge Petty's *physical* ability to performing the applicable job duties, he was necessarily qualified for reemployment as a patrol sergeant. *Id.* at 441-442. Respectfully, the Sixth Circuit erred in resolving both of these exceptionally important issues.

REASONS FOR GRANTING THE PETITION

Local law enforcement agencies have an obligation to the public to ensure that police officers are well-trained and both physically and mentally capable of performing their job duties. At the same time, employers are obligated to reemploy promptly individuals who return from military leave. This case presents the opportunity to resolve the tension between these competing sets of obligations, and raises the exceptionally important question of whether the Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-4334, prohibits employers in safety-sensitive fields like local law enforcement from ensuring that returning veterans are qualified to resume their jobs before returning them to work.

The specific grounds for granting the Metropolitan Government's Petition for Writ of Certiorari are straightforward. First, the Sixth Circuit's conclusion that the Metropolitan Police Department is precluded from applying any return-to-work process to returning veterans is inconsistent with the text of USERRA. Under 38 U.S.C. § 4313(a), an employer's obligation to

reemploy a veteran in a particular position is contingent upon the veteran being "qualified" for the position. The descending order of reemployment positions set forth in Section 4313(a) necessarily contemplates an analysis of whether a returning veteran is "qualified" for a particular position before reemploying the veteran in that position. However, the Sixth Circuit held that the Metropolitan Government was precluded from inquiring into Petty's qualification to return to service as a patrol sergeant. In so doing, the Sixth Circuit departed from the plain text of USERRA and rendered the "qualification" language in 38 U.S.C. § 4313(a) superfluous.

Second, the Sixth Circuit's interpretation of "qualified," as that term is used in USERRA, is inconsistent with the Department of Labor's regulations interpreting this term and creates a circuit split on the issue. After holding that employers are precluded from applying any return-to-work process to returning veterans, the Sixth Circuit concluded that Petty was necessarily "qualified" to return to service because (1) he received a non-disqualifying discharge from the military, and (2) his physical ability to perform the applicable job duties was unchallenged. But as the Department of Labor's regulations establish, and as the United States Courts of Appeals for the First and Second Circuits have held, "qualified" means more than being physically capable of performing the applicable job duties; it means being physically, *mentally*, and *temperamentally* capable of performing all of the essential job functions. The Metropolitan Government submits that Sixth Circuit erred in defining "qualified" too narrowly.

Respectfully, the Sixth Circuit's decision is not only incorrect; it has the potential to endanger the public. The wars in Iraq and Afghanistan have led to the largest mobilization of National Guard and Reserve service members since World War II. When those soldiers return from active duty, the majority of them will go back to their civilian jobs. There is a distinct possibility that someone will be grievously injured by a returning veteran who, in the absence of any reevaluation, is summarily put back to work as a police officer. That hypothetical should not become a reality before the Sixth Circuit's decision is reviewed.

For these reasons, and as discussed in more detail below, the Metropolitan Government respectfully requests plenary review of this matter.

I. The Court Should Grant Certiorari Because the Sixth Circuit's Decision Conflicts With the Text of USERRA – USERRA Does Not Prohibit Employers From Ensuring That Returning Veterans Are Qualified to Resume Their Jobs Before Returning Them to Work

The first step in the Sixth Circuit's analysis of Petty's failure to reemploy claim is its conclusion that the Metropolitan Police Department is prohibited from applying its return-to-work process to individuals returning from military leave. *Petty*, 538 F.3d at 440-41. The Court of Appeals concluded that under USERRA, the Police Department was entitled to consider only four things when Petty sought reemployment: (1) whether he gave advance notice of his leave; (2) whether his cumulative military leave exceeded five years; (3) whether he applied for reemployment within the

specified time period; and (4) whether his separation from service was under "honorable conditions." *Id.* at 440.

Contrary to the Courts' holding, 38 U.S.C. § 4313(a) makes clear that an employer's obligation to reemploy a veteran in a particular position is contingent upon the veteran being "qualified" for the position. Not all individuals returning from military leave will remain qualified for their previous positions, and USERRA does not dictate that employers must put unqualified individuals back to work. This is particularly important in the context of local law enforcement agencies, which have "a paramount interest in protecting the public by ensuring that [their] employees are fit to perform their jobs." *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008 (D.C. Cir. 1985).

A. Section 4313(a) of USERRA Dictates That an Employer's Obligation to Reemploy a Veteran in a Particular Position is Contingent Upon the Veteran Being "Qualified" for the Position

38 U.S.C. § 4312(a) provides that —

> any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if —
>
> > (1) the person . . . has given advance written or verbal notice of such service to such person's employer;

> (2) the cumulative length of the absence . . . by reason of service in the uniformed services does not exceed five years; and
>
> (3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

Id. Pursuant to § 4312(e), which is cross-referenced in § 4312(a)(3), an individual whose military service lasts longer than 180 days must submit an application for reemployment "not later than 90 days after the completion of the period of service." 38 U.S.C. § 4312(e)(1)(D). Furthermore, pursuant to § 4312(f)(1), which is also cross-referenced in § 4312(a)(3), a returning veteran must provide his or her employer with documentation showing that the application is timely; the veteran's cumulative military leave has not exceeded five years; and the veteran's separation from service was non-disqualifying. *See* 38 U.S.C. § 4312(f)(1).

The Sixth Circuit held that Petty was entitled to be reemployed as a police sergeant because he satisfied the requirements of § 4312. *Petty*, 538 F.3d at 443. Specifically, the Court stated:

> At the point at which Petty was entitled to reemployment under §§ 4312 and 4313, Metro had no basis on which to question his qualifications. Petty had satisfied the only prerequisites to § 4313 — those specified in §4312 — and Metro's attempt to impose

> additional prerequisites through its return-to-work process was, as we have already explained, wholly impermissible.

Id.

Contrary to the Court's holding, Section 4312 does not dictate that a returning veteran must be placed back into a particular position simply because he or she has provided the four pieces of information discussed above. Instead, Section 4312 dictates that an individual who provides this information *is entitled to USERRA protection.* This is a crucial distinction – an individual who provides the aforementioned information is *not* entitled to be put back into a particular position automatically; an individual who provides this information is "entitled to the reemployment rights and benefits and other employment benefits of this chapter . . . ." 38 U.S.C. 4312(a). The next section, 38 U.S.C. § 4313, dictates the specific "reemployment rights and benefits" to which an individual is entitled.

In the instant case, Section 4313(a)(2) is applicable because Petty was on military leave for more than 90 days. Under Section 4313(a)(2), the general rule is that returning veterans are to be reemployed in the position they would have been in had their continuous service not been interrupted by military duty (the "escalator position"). *See* 38 U.S.C. § 4313(a)(2). But subsections (a)(2)(a), (a)(2)(b), and (a)(4) dictate that to be entitled to reemployment in a particular position – whether it be the escalator position, the individual's former position, or a lesser position – the veteran must be

"*qualified*" for that position. Specifically, Section 4313(a) states:

> [A] person entitled to reemployment under section 4312, upon completion of service in the uniformed services, *shall be promptly reemployed in a position of employment in accordance with the following order of priority*:
>
> * * *
>
> (2) except as provided in subparagraphs (3) and (4), in the case of a person whose period of service was for more than 90 days —
>
> (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, *the duties of which the person is qualified to perform*; or
>
> (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, *the duties of which the person is qualified to perform*, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after

> reasonable efforts by the employer to qualify the person.
>
> * * *
>
> (4) In the case of a person who (A) is *not qualified* to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) *cannot become qualified* with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) *which such person is qualified to perform*, with full seniority.

38 U.S.C. § 4313(a)(emphasis added).[4]

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4. 38 U.S.C. § 4313(a) states that "a person entitled to reemployment under section 4312 . . . shall be promptly reemployed" in the order of priority set forth above. 20 C.F.R. § 1002.181 provides that "[a]bsent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." *Petty*, 538 F.3d at 444 (*quoting* 20 C.F.R. § 1002.181).

(Cont'd)

Subsections (a)(2)(a), (a)(2)(b), and (a)(4) necessarily contemplate an analysis of whether a returning veteran is "qualified" for a particular position before placing the veteran in that position. This is evident because the first sentence of Section 4313(a) states that a veteran shall be "reemployed in a position of employment in accordance with the following order of priority . . . ." An employer must evaluate the returning veteran's qualifications to determine the appropriate reemployment position. Had the drafters intended for USERRA to obligate employers to reemploy veterans in the escalator position, and then determine whether they were "qualified," the descending order of positions would not be part of the initial "reemployment" obligation.

(Cont'd)

Petty requested reemployment on February 28, 2005. The Metropolitan Government returned Petty to work on March 21, 2005. The District Court held that "three weeks is not an unreasonable amount of time for the Metropolitan Government to take in evaluating an individual who has been on active service and away from the Department for more than a year." *Petty*, 2006 WL 3333509, *8. The Court of Appeals held, however, that the Metropolitan Government committed a *per se* violation of USERRA by failing to rehire Petty within two weeks of his request for reemployment. *Petty*, 538 F.3d at 444.

The Metropolitan Government submits that the Court of Appeals erred in holding that, under the circumstances of this case, the Police Department violated USERRA by returning Petty to work three weeks after he requested reemployment. Nevertheless, the larger issue is whether USERRA prohibits employers from ensuring that returning veterans are qualified to resume their jobs before putting them back to work. For this reason, and because the Court of Appeals' resolution of the timing issue hinges upon its resolution of the qualification issue, the Metropolitan Government has focused on the latter issue.

Furthermore, if employers are permitted to consider only the four pieces of information that the Sixth Circuit identified, the "qualification" language in 38 U.S.C. § 4313(a) is rendered superfluous. It is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The qualification language in 38 U.S.C. § 4313(a) serves no purpose if, as the Sixth Circuit held, the Metropolitan Government is only entitled to consider (1) whether Petty gave advance notice of his leave; (2) whether his cumulative military leave exceeded five years; (3) whether he applied for reemployment within the specified time period; and (4) whether his separation from service was under "honorable conditions." *Petty*, 538 F.3d at 440-41. For this language to be given effect, an employer must be permitted to consider on some level whether a returning veteran is qualified for a particular position before placing the individual in that position.

The Department of Labor's regulations interpreting USERRA support this analysis. Specifically, 20 C.F.R. § 1002.191 states that "[d]epending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position."[5] Thus,

5. Congress delegated to the Secretary of Labor the authority "to prescribe regulations implementing the provisions of [USERRA] with regard to the application of this

(Cont'd)

"[n]otwithstanding the escalator principle, *USERRA does not require an employer to reinstate a returning service member in an employment position if he or she is not qualified to perform the civilian job.*" 70 Fed. Reg. 75246, 75274 (emphasis added).

Section 4313(a) dictates that an employer's obligation to reemploy a veteran in a particular position is contingent upon the veteran being qualified for the position. But the Sixth Circuit held that USERRA prohibits employers from taking steps to determine whether returning veterans are "qualified" to resume their jobs before returning them to work. In so doing, the Sixth Circuit departed from the plain text of USERRA and rendered the "qualification" language in Section 4313(a) superfluous. Furthermore, the Court of Appeals' decision does not appropriately weigh local law enforcement agencies' obligation to the public to ensure that individuals serving as police officers are physically, mentally, and temperamentally fit for duty.

(Cont'd)

chapter to States, local governments, and private employers." 38 U.S.C. § 4331(a). As this Court stated:

> When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

U.S. v. Mead Corp., 533 U.S. 218, 227 (2001) (*quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

B. Local Law Enforcement Agencies Have an Obligation to the Public to Ensure That Individuals Entrusted With the "Awesome and Dangerous Power" of Being a Police Officer Are Fit for Duty

The wars in Iraq and Afghanistan have led to the largest mobilization of National Guard and Reserve service members since World War II. *See* Department of Labor Press Release dated December 16, 2005 (*http://www.dol.gov/dol/highlights/infocus-2005.htm*). When those soldiers return from active duty, the majority of them will go back to their civilian jobs. They will be police officers, fire fighters, teachers, and so forth. But the mental and physical strain of serving in a war zone is not simply left behind when soldiers come home. "[M]ental experts estimate that more than 15% of service members returning from Iraq and Afghanistan could develop post-traumatic stress disorder because of the intensity of those conflicts." Sharon M. Erwin, *When the Troops Come Home: Returning Reservists, Employers and the Law*, 19 No. 5 Health Law. 1, 10 (April 2007) (*citing* U.S. Government Accountability Office, *Military Personnel, Additional Actions Needed to Improve Oversight of Reserve Employment Issues*, GAO-07-259, 36 (February 2007)). According to a 2006 article published in *The Journal of the American Medical Association*, 31 percent of Iraq war veterans sought mental health services in the year after returning home, and 12 percent were diagnosed with a mental health problem. *See* Charles W. Hoge, M.D. *et al., Mental Health Problems, Use of Mental Health Services, and Attrition From Military Service After Returning From Deployment to Iraq or Afghanistan*, JAMA Vol. 295 No. 9, 1023 (March 1, 2006). Moreover,

"returning service members suffering from mental disorders report problems restraining negative emotions, especially anger and aggression." *See Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* 144 (Terri Tanielian & Lisa H. Jaycox eds., 2008). This information is particularly important in the context of a veteran attempting to return to work as a police officer, because, as the District Court recognized, "[p]olice officers carry weapons, are endowed with arresting and other authority by local governments, and are required to exercise sound judgment in volatile situations." *Petty*, 2006 WL 3333509, at *7.

Throughout this case, the Metropolitan Government has argued that the Police Department not only has the right, but an obligation, to ensure that its officers are physically, mentally, and temperamentally fit for duty. The Sixth Circuit summarily dismissed this argument, stating:

> It is of no consequence here that Metro believes it is obligated to "ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police Officer is still physically, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department." *In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns.*

Petty, 538 F.3d at 441 (emphasis added).

Respectfully, the Police Department's obligation to ensure that its officers are fit for duty is not merely a belief. The Fourth Amendment to the United States Constitution prohibits "unreasonable seizures of the person . . . ." *Graham v. Connor*, 490 U.S. 386, 394 (1989). As this Court stated in authorizing suspicionless drug testing for customs officials, "[c]ustoms employees who may use deadly force plainly 'discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'" *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989) (citations omitted). Unlike most private citizens or general government employees, employees who are required to carry firearms "should expect effective inquiry into their fitness and probity." *Id.* at 672. This is because "*the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.*" *Id.* at 671 (emphasis added). Thus, as this Court concluded in *Von Raab*, "[i]t is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 671.

The same is true of police officers. Police officers are entrusted with "awesome and dangerous power." *Policemen's Benevolent Ass'n of New Jersey v. Washington*, 850 F.2d 133, 141 (3d Cir. 1988) (holding that drug testing of police officers is permissible under the Fourth Amendment). Accordingly, local law enforcement agencies have "a paramount interest in protecting the public by ensuring that [their] employees

are fit to perform their jobs." *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008 (D.C. Cir. 1985).[6] As this Court held in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), a police department's failure to train or supervise officers may subject a municipality to liability under 42 U.S.C. § 1983 if the failure "reflects deliberate indifference to the constitutional rights of its

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6. *See also Bone v. City of Louisville*, 2000 WL 761870, at *3 (6th Cir.) (holding that, under the ADA, "appropriate psychological screening is job-related and consistent with business necessity where the selection of individuals to train for the position of police officer is concerned"); *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) ("[T]he ADA does not, indeed cannot, require a police department to forgo a fitness for duty examination to wait until a perceived threat becomes real or questionable behavior results in injuries."); *Miller v. Springfield*, 146 F.3d 612, 615 (8th Cir. 1998) ("[W]e easily conclude that appropriate psychological screening is job-related and consistent with business necessity where the selection of individuals to train for the position of police officer is concerned."); *Caver v. City of Trenton*, 192 F.R.D. 154, 163 (D. N.J. 2000) (holding that psychological testing of police officers is appropriate "not only to benefit the officer's mental well-being, but more importantly, to ensure the safety of the community by protecting its citizens from police officers whose mental instability poses a risk to public safety"); *Thompson v. City of Arlington, Tex.*, 838 F. Supp. 1137, 1146-47 (N.D. Tex. 1993) (holding that police department's interest in obtaining officer's psychological records "is of the highest order because . . . 'the public should not bear the risk that employees who may suffer from impaired perception and judgment will be [in] positions where they may need to employ deadly force'"); and *Bostic v. McClendon*, 650 F. Supp. 245, 250 (N.D. Ga. 1986) (holding that "it is evident that the East Point Police Department has a strong interest in protecting the public by ensuring that its employees are fit to perform their jobs").

inhabitants." Similarly, a government official's failure to scrutinize an applicant's background may give rise to liability under Section 1983 where adequate scrutiny of the applicant's background "would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected rights . . . ." *Bd. of County Comm'ns of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 411 (1997). Thus, a local law enforcement agency's failure to screen, train, or supervise returning veterans may give rise to municipal liability under 42 U.S.C. § 1983. Moreover, even if governmental liability does not attach, failure to screen, train, or supervise returning veterans may result in constitutional violations.[7]

USERRA protects the rights of servicemen and women. But USERRA does not make the public's right to a qualified police force subordinate to returning veterans' reemployment rights. Nevertheless, under the Sixth Circuit's holding, employers – even employers in

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7. As set forth in more detail in Section II.B., truthfulness is an essential component of police work. Failure to monitor officers' truthfulness may result in violations of the Fourth Amendment, and under certain circumstances, may give rise to municipal liability under 42 U.S.C. § 1983. *See, e.g., Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999) (holding that a police department's failure to discipline for perjury may give rise to a cause of action under 42 U.S.C. § 1983); *Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992) ("If Walker can produce some evidence that policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision, his claim can survive summary judgment.")

safety-sensitive fields like local law enforcement – are prohibited from ensuring that returning veterans are still fully qualified for their positions, regardless of any threat to the veteran, his or her co-workers, or the public. Respectfully, the Sixth Circuit erred in its interpretation of USERRA, and the Metropolitan Government requests that this Court grant plenary review of this matter.

II. The Court Should Grant Certiorari Because The Sixth Circuit's Decision Is Contrary to the Text of USERRA, is Contrary to the Department of Labor's Regulations Interpreting USERRA, and Creates a Circuit Split on the Issue of What "Qualified" Means Under USERRA

A. Under USERRA, "Qualified" Means Physically, Mentally, and Temperamentally Capable of Performing the Essential Job Functions

The second step in the Sixth Circuit's analysis of Petty's failure to reemploy claim is its conclusion that Petty was necessarily "qualified" to serve as a police sergeant because (1) he received a non-disqualifying discharge from the U.S. Army Reserves, and (2) his physical ability to perform the job duties was not at issue. *Petty*, 538 F.3d at 441-42. The Sixth Circuit reasoned as follows:

> Metro does not question Petty's physical qualifications; instead, it questions only whether his conduct during his military service would disqualify him from returning to service in the police department. But Petty's separation from military service is classified as "under honorable

> conditions," which Congress has made clear suffices to qualify him for USERRA benefits.

Id. at 441.

As an initial matter, the Metropolitan Government's position in this litigation was, and is, that Petty's *dishonesty* when he returned from military leave renders him unqualified to serve as a police officer. *See* Appellee's Brief, pgs. 21, 29, 34-35, 40-47, and 49. In fact, the Court of Appeals recognized this point later in its opinion, stating: "Metro argues *only* that it did not violate § 4313 because, perhaps having been *dishonest* in the return-to-work process, Petty may not be qualified to hold these positions." *Petty*, 538 F.3d at 444 (emphasis added).

Leaving this issue aside, however, "qualified," as that term is used in 38 U.S.C. § 4313, and defined by the Department of Labor, means more than simply being physically capable of performing the applicable job functions. USERRA defines "qualified" as "having the ability to perform the essential tasks of the position." 38 U.S.C. § 4303(9). The Department of Labor's regulations interpreting USERRA clarify that whether a task is essential depends, at least in part, upon the employer's judgment as to what functions are essential. Specifically, 20 C.F.R. § 1002.198(a)(2) states:

> Whether a task is essential depends on several factors, and these factors include but are not limited to:
>
> (i) The employer's judgment as to which functions are essential;

> (ii) Written job descriptions developed before the hiring process begins;
>
> (iii) The amount of time on the job spent performing the function;
>
> (iv) The consequences of not requiring the individual to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.

Id.

Moreover, the Sixth Circuit's narrow construction of the term "qualified" conflicts with the First Circuit Court of Appeals' decision in *Lapine v. Town of Wellesley*, 304 F.3d 90, 103 (1st Cir. 2002), and the Second Circuit Court of Appeals' decision in *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 792 (2d Cir. 1997). In *Lapine*, the First Circuit held that "[t]o be 'qualified' to return to a prior position, the veteran must be both *physically capable of performing the duties of the job and temperamentally able to work harmoniously with co-workers and supervisors*." 304 F.3d at 103 (emphasis

added).[8] Similarly, in *Preda*, the Second Circuit held that "[t]he VRRA should not be interpreted to forbid consideration of the same factors in determining whether the former employee is still qualified for employment."[9] 128 F.3d at 792; *see also Green v. Tho-Ro Prods.*, 232 F.2d 172 (3d Cir. 1956) (holding that returning veteran was unqualified when he engaged in fraudulent behavior described as "active and gross provocation"); *Greathouse v. Babcock & Wilcox Co.*, 381 F. Supp. 156, 163 (N.D. Ohio 1974) (holding that qualified "means more than just physically and mentally able to perform the job").

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8. In *Lapine*, the First Circuit upheld the lower court's determination that the veteran was not "temperamentally unqualified." However, in that case, the employer relied primarily on evidence that the veteran acted inappropriately before going on military leave. The First Circuit reasoned:

> Given [the veterans' recent] positive reviews, as well as the fact that the department did not terminate him after his egregious acts but allowed him to stay on for a number of years during which no similar incident occurred, we can see no adequate basis for overturning the magistrate judge's finding that he was qualified.

Lapine, 304 F.3d at 104.

9. In *Preda*, the Second Circuit was interpreting "qualified" as that term is used in the Veterans Reemployment Rights Act. As the Sixth Circuit recognized in the instant case, however, "[r]elevant pre-USERRA case law is properly considered as a guide in interpreting USERRA." *Petty*, 538 F.3d at 439.

B. For Police Officers, Truthfulness is One of the Fundamental Qualifications for the Job

Notwithstanding the foregoing, the Sixth Circuit held that Petty's multiple instances of dishonesty during the Police Department's return-to-work process could not serve as a basis for limiting his right to reemployment. *Petty*, 538 F.3d at 443-44. But for police officers, truthfulness is one of the fundamental qualifications for the job. The Fourth Amendment to the United States Constitution governs "both the manner of, and the cause for," an arrest, and its "vitality depends upon its constant observance by police officers." *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring). Accordingly, "[i]t is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer." *Zahrey v. Coffey*, 221 F.3d 342, 355 (2d Cir. 2000); *see also Albright*, 510 U.S. at 279 ("If Oliver gave misleading testimony at the preliminary hearing, that testimony served to maintain and reinforce the unlawful haling of Albright into court, and so perpetuated the Fourth Amendment violation.") (Ginsburg, J., concurring); *Gregory v. City of Louisville*, 444 F.3d 725, 750 (6th Cir. 2006) (holding that an examiner with the state police could be held liable under 42 U.S.C. § 1983 for allegedly suppressing exculpatory evidence and fabricating inculpatory evidence). Indeed, a police department's deliberate indifference to an officer's pattern of untruthfulness may give rise to municipal liability under 42 U.S.C. § 1983. *See, e.g.*, *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999) (holding that a police department's failure to discipline for perjury may give rise to municipal liability under 42 U.S.C. § 1983); *Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992) ("If Walker can produce some evidence that policymakers were aware

of a pattern of perjury by police officers but failed to institute appropriate training or supervision, his claim can survive summary judgment.").

Moreover, under a series of decisions by this Court, prosecutors must disclose to the defense any information that could be used to discredit government witnesses. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); and *Brady v. Maryland*, 373 U.S. 83 (1963). To that end, in 1996, the United States Attorney General's Office implemented a policy outlining the obligation of federal investigative agencies to disclose potential impeachment information to federal prosecutors. *See Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information* (December 9, 1996). This policy, referred to as the "Giglio Policy," provides that "[e]ach investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case." *Id.*[10] Similarly, federal prosecutors must "seek all exculpatory

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10. As defined by the United States Attorney General's Office, potential impeachment evidence —

> may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information (December 9, 1996).

and impeachment information from all members of the prosecution team," including "federal, state, and local law enforcement officers . . . ." *See U.S. Attorneys' Manual* § 9-5.000(B)(2) (Dec. 2006). This includes evidence that a local law enforcement official has a history of untruthfulness. *See* Lisa A. Judge, *Disclosing Officer Untruthfulness to the Defense: Is a Liars Squad Coming to Your Town?*, Police Chief Magazine, Vol. 72, No. 11, pg. 1 (Nov. 2005).

Failure to monitor officers' truthfulness may result in Fourth Amendment violations, and under certain circumstances, may give rise to municipal liability under 42 U.S.C. § 1983. Moreover, as set forth in the U.S. Attorneys' Manual, "[g]overnment disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee of a fair trial." *U.S. Attorneys' Manual* § 9-5.000(B) (Dec. 2006). As a result, local law enforcement agencies must "deal more forcefully with officers who lie." Judge, *supra*, at 3. For example, "[d]epartments may choose to adopt strict policies regarding truthfulness and rigorously adhere to those policies." *Id.* That is what the Metropolitan Police Department has done. It has adopted a "zero tolerance" policy for officers who are dishonest. The first offense results in termination. *Petty*, 538 F.3d at 437-38.

Under the factors set forth by the Department of Labor, truthfulness is "essential" to serving as a police officer. *See* 20 C.F.R. 1002.198(a)(2). Furthermore, under the First Circuit Court of Appeals' decision in *Lapine*, 304 F.3d at 103, and the Second Circuit Court of Appeals' decision in *Preda*, 128 F.3d at 792, the Police Department should be permitted to consider a returning veteran's

truthfulness when determining whether he or she is "qualified" to serve as a police officer. But the Sixth Circuit held that "qualification" is merely a function of (1) receiving a non-disqualifying discharge from the military, and (2) physical ability to perform the applicable job duties. Respectfully, the Sixth Circuit erred in construing the term "qualified" so narrowly.

C. Petty's Pattern of Deceit, Which the Sixth Circuit Wholly Ignored, Renders Him Unqualified to Serve as a Police Officer

Turning to facts of the instant case, Petty misled the Police Department when he reported that he faced one charge in Kuwait when he actually faced two. He misled the Police Department when he reported that he had alcohol in his quarters in Kuwait for a legitimate purpose. He misled the Police Department when he submitted a copy of his DD-214 that omitted "Narrative Reason for Separation: In lieu of trial by court martial." Furthermore, if the Metropolitan Government's theory of the case is correct, Petty compounded his misdeeds by committing perjury during his deposition and during the trial of this matter.

In light of Petty's repeated attempts to mislead the Police Department, he is not "qualified" to serve as a police officer. But the Sixth Circuit held that Petty is necessarily "qualified" because (1) he received a non-disqualifying discharge, and (2) his physical ability to perform the applicable job duties was not questioned. Respectfully, in the context of police work, "qualified" means more than simply being able to drive a patrol car, pass a firearms test, or write a ticket. "Qualified"

means being capable of performing *all* of the essential functions of a position, and employers should be entitled to consider "the same factors in determining whether [a] former employee is still qualified for employment." *Preda*, 128 F.3d at 792. The Sixth Circuit erred in holding otherwise, and the Metropolitan Government requests that this Court grant certiorari to review this issue.[11]

[11] The Sixth Circuit also erred in holding that Petty was "qualified" to serve as a police sergeant because the Metropolitan Government "has never *proven* [his] disqualification for reemployment." *Petty*, 538 F.3d at 444 (emphasis original). The flaw in the Court's analysis is that neither USERRA, nor the case the Court cites in support of this proposition, *McCoy v. Olin Mathieson Chem. Corp.*, 360 F. Supp. 1336 (S.D. Ill. 1973), contemplates that an employer must establish by a preponderance of the evidence that the employee is not "qualified" *before* declining to place the veteran into a position for which he or she is not "qualified." There is no question that the employer has the burden of proof on the issue, but the employer has the burden of proof *at trial*, not before. In the instant case, the Sixth Circuit reversed summary judgment for the Metropolitan Government and granted summary judgment for Petty based upon its conclusion that the Metropolitan Government had not yet *proven* that Petty is "unqualified." The inescapable implication is that before an employer may lawfully decline to return a veteran to a particular position, the employer must prove by a preponderance of evidence that the veteran is not qualified. But there is no mechanism in USERRA for such a proceeding, and there is no indication that this is what Congress intended. Furthermore, the case the Court cites, *McCoy*, was decided *after* a trial in which the employer was afforded an opportunity to present proof in support of its argument that the returning veteran was not "qualified." The employer in *McCoy* failed to satisfy its burden of proof on this issue, but it had an opportunity to present proof on this issue. Thus, even if summary judgment in the Metropolitan Government's favor was not appropriate, the next step should have been to remand the case for a trial, not to direct entry of summary judgment in Petty's favor.

CONCLUSION

The Sixth Circuit's conclusion that the Metropolitan Police Department is precluded from applying any return-to-work process to returning veterans is inconsistent with the text of USERRA. Under 38 U.S.C. § 4313(a), an employer's obligation to reemploy a veteran in a particular position is contingent upon the veteran being "qualified" for the position. Section 4313(a) necessarily contemplates an analysis of whether a returning veteran is "qualified" for a particular position before reemploying the veteran in that position. In holding that the Metropolitan Government was wholly precluded from inquiring into Petty's qualification to serve as a patrol sergeant, the Sixth Circuit departed from the plain text of USERRA and rendered the "qualification" language in 38 U.S.C. § 4313(a) superfluous.

Furthermore, the Sixth Circuit's interpretation of "qualified," as that term is used in USERRA, is inconsistent with the Department of Labor's regulations interpreting this term and creates a circuit split on the issue. The Sixth Circuit concluded that Petty was "qualified" to return to service because (1) he received a non-disqualifying discharge from the military, and (2) his physical ability to perform the applicable job duties was unchallenged. But as the Department of Labor's regulations establish, and as the United States Courts of Appeals for the First and Second Circuits have held, "qualified" means more than being physically capable of performing the applicable job duties; it means being physically, *mentally*, and *temperamentally* capable of performing all of the essential job functions. The Metropolitan Government submits that Sixth Circuit erred in defining "qualified" too narrowly.

Under the Sixth Circuit's analysis, a heart surgeon who returns from military leave must be sent right back into the operating room – the hospital would be prohibited from taking any steps to ensure that the surgeon is still qualified to perform surgery. An emergency medical technician who returns from military leave must be sent right back out into the field – the emergency medical unit would be prohibited from determining whether the individual's certifications are still valid. And a police officer who returns from military leave must be sent right back out onto the street – the police department would be prohibited from determining whether the officer is still able to "exercise sound judgment in volatile situations." *Petty*, 2006 WL 3333509, at *7.

Congress did not intend for USERRA to make the public's right to a qualified police force subordinate to a returning veteran's right to reemployment. But that is the result of the Sixth Circuit's decision. Because the issues discussed herein are so important and because the Sixth Circuit's decision has such wide-reaching implications, the Metropolitan Government respectfully requests plenary review of this matter.

Respectfully submitted,

SUE B. CAIN
Director of Law
JAMES L. CHARLES
Associate Director of Law
KEVIN C. KLEIN*
Assistant Metropolitan Attorney
DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
TENNESSEE
P.O. Box 196300
108 Metropolitan Courthouse
Nashville, Tennessee 37219-6300
(615) 862-6341

Attorneys for Petitioner

* *Counsel of Record*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 18, 2008

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 07-5649.

Brian PETTY,

Plaintiff-Appellant,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE-DAVIDSON COUNTY,

Defendant-Appellee.

Argued: March 20, 2008.
Decided and Filed: Aug. 18, 2008.
Rehearing and Rehearing En Banc Denied Oct. 30, 2008.

Before: KENNEDY, BATCHELDER, and GRIFFIN, Circuit Judges.

Appendix A

OPINION

ALICE M. BATCHELDER, Circuit Judge.

Plaintiff-Appellant Brian Petty appeals the district court's summary judgment and judgment on partial findings in favor of Metropolitan Government of Nashville-Davidson County ("Metro") on claims that Metro violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301-4334. Because the district court erred in its application of §§ 4312 and 4313, we reverse the district court's grant of summary judgment for Metro on two claims asserted under these provisions, and order that summary judgment be entered in favor of Petty on those claims. Further, because the district court made errors of both fact and law in its judgment on partial findings under § 4311, we vacate that judgment.

I. BACKGROUND

The central dispute in this case is whether Metro violated USERRA in its treatment of Petty, a former police officer who left the department for active duty with the United States Army and who sought reemployment with the department after completion of his military service. There are few, if any, disputes regarding the factual background as described by the district court in its order granting summary judgment for Metro:

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> The parties agree to the following facts: Plaintiff joined the Army National guard in 1986 and opted into the Army Reserve with the Army National Guard as his "reserve component" in 1989. The Defendant hired the Plaintiff as a police officer on February 1, 1991. In 1993, Metro assigned the Plaintiff to patrol the West sector of Nashville, where Plaintiff focused on crime prevention in housing projects. Metro promoted the Plaintiff to the rank of sergeant in January, 2000, whereupon he started supervising other officers in the South sector. After various reassignments, Plaintiff returned to patrolling the West sector in the fall of 2002, where he continued supervising other officers.

All Metro police officers must get approval for off-duty work, and the Plaintiff sought and received Metro's approval to work as a security guard at the South Street and Bound'ry restaurants prior to his deployment.

Plaintiff remained in the Army Reserve through 2003. In October of 2003, the Army called Plaintiff at work to tell him that he "was being transferred to another unit to take command as they were being mobilized" for service in Operation Iraqi Freedom. Plaintiff told his lieutenant at Metro, Kim Dillingham, of his upcoming military leave the same day that the Army informed him. The week after the Army contacted him, the Plaintiff took his first trip to Chattanooga to begin preparations for deployment, and he stopped working at Metro altogether on November 30, 2003.

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On January 2, 2004, the unit Plaintiff commanded had its official mobilization ceremony. The next day the unit left for Fort Stewart, Georgia. The unit was in Fort Stewart until roughly February 20, when it was transferred to Camp Navistar/Big Sky Oasis in Kuwait.

The Army assigned the Plaintiff to run the "mayor's cell" at Camp Navistar. Plaintiff's unit ran the camp on a day-to-day basis-moving supplies; setting out bottled water for soldiers; handling any problems with housing, etc. The job also required Plaintiff to empty and store contraband from "amnesty boxes."

In June or July, 2004, Command Sergeant Thomas Seuberling conducted a health and welfare inspection of Plaintiff's quarters. During the initial inspection, CSM Seuberling found a five-gallon jerry can (which looks like a gas can) that Plaintiff was using to manufacture homemade wine.[1]

Plaintiff claims that he had alcohol in his tent because CSM Seuberling asked him to obtain alcohol. Specifically, Plaintiff claims that CSM Seuberling told him that he was negotiating with a Kuwaiti farmer to

1. Many of the statements made by Mr. Seuberling in his affidavit regarding this incident in Kuwait contradict the Plaintiff's testimony, and are disputed by the Plaintiff. As credibility determinations are inappropriate for summary judgment, and a factual finding as to the events that took place in Kuwait are unnecessary to the Court's decision, the Court does not rely on the disputed statements in Mr. Seuberling's affidavit.

get him to cut down some trees that were blocking the camp's guard towers, and that the farmer would cut down the trees if he could get him some alcohol.

Based upon CSM Seuberling's health and welfare inspection, and the resulting investigation, Plaintiff was charged with a violation of the Military Code of Justice. Specifically, Plaintiff was charged with: (1) violation of a lawful order; and (2) conduct unbecoming an officer. With regard to the first charge, Plaintiff was accused of violating U.S. Central command General Order 1A, in that he was in possession of, and manufactured, alcohol. By Plaintiff's own admission, he was in possession of, and was manufacturing, alcohol. Plaintiff testified in his deposition that his intent in manufacturing wine in his tent was "mainly" to use it as an incentive for the farmer to clear trees, but he acknowledged that he may have used the wine for his own consumption eventually. Plaintiff also admits receiving bottles of alcohol while in Kuwait, and using them for personal consumption.

With respect to the conduct unbecoming an officer charge, Plaintiff was accused of offering alcohol to enlisted soldiers. By Plaintiff's own admission, he gave alcohol to a female enlisted soldier, Sergeant Melanie Barnhart. Furthermore, by Plaintiff's own admission, he and Sergeant Barnhart drank together. Plaintiff knew that giving alcohol to a soldier was a violation of General Order 1A. Nevertheless, Plaintiff gave alcohol to Sergeant Barnhart anyway, and he drank with her.

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In late 2004, Plaintiff appeared in front of a military judge, where he was arraigned. In lieu of going forward with court martial proceedings, Plaintiff submitted a request to resign his commission "for the good of the service." When Plaintiff submitted his request to resign "for the good of the service," the Army relieved him of his command, meaning that he was relieved of his supervisory responsibilities. Plaintiff was notified on January 15, 2005 that his resignation "for the good of the service" had been approved. The Army formally dismissed all charges against him in January 2005.

When he left active duty, Plaintiff received two versions of his Department of Defense Form DD-214. One focuses on awards, commendations, and service dates, but does not include the "character of service." The other includes the character of service.

Plaintiff's discharge was characterized as "under honorable conditions (general)." The Army returned Plaintiff to Fort Stewart, Georgia on or about February 1, 2005.

Plaintiff visited Metro to request reinstatement on February 28, 2005. The Police Department has a return-to-work process for officers who have been away from the Police Department for an extended period of time. This return-to-work process applies to all officers who have been away from the Police Department for an extended period of time, regardless of the reason for their separation. The Police Department's return-to-work process includes a personal history update

questionnaire, a medical examination, a computer voice stress analysis, a drug screening, and a debriefing with a Police Department psychologist. In addition, the Police Department requests that returning officers execute a medical records authorization, and for individuals returning from military duty, an authorization to obtain military records. The purpose of the Police Department's return-to-work process is to ensure that every individual entrusted with the responsibility of being a Metropolitan Police Officer is still physically, emotionally, and temperamentally qualified to be a police officer after having being absent from the Department.

One of the questions on the personal history questionnaire Plaintiff filled out during the return-to-work process asked: "During your absence were you arrested, charged, detained, or a suspect in any criminal action or military disciplinary action for any reason or do you have any action pending? If yes, explain in detail (use back if necessary)." Plaintiff answered "Yes." He also attached a narrative explanation of his response in which he admitted facing military charges in Kuwait. The narrative description did not disclose: (1) that Plaintiff was accused of giving alcohol to an enlisted soldier; and (2) that Plaintiff was accused of manufacturing alcohol.

Plaintiff did not receive any salary or benefits for the period of examination between February 28, 2005 and March 21, 2005.

On March 21, 2005, Defendant returned the Plaintiff to work. Defendant did not, however, return the Plaintiff to his original position of patrol sergeant, or a substantially similar position. Plaintiff contends that he was assigned to an office job in which he primarily answered telephone calls from the public. Defendant states that Plaintiff has also taken police reports, which is a duty that must be performed by a sworn police officer.

The Metropolitan Police Department's Office of Professional Accountability ("OPA") serves the internal affairs function of the Metropolitan Police Department. OPA initiated an investigation focused on whether Plaintiff was honest and truthful when he completed return-to-work paperwork after returning from military service.[2] The Police Department's "Disciplinary/ Corrective Action Grid" indicates that the Department has a zero tolerance for dishonesty.

On April 14, 2005, Metro issued a Notice of Complaint to Plaintiff outlining these charges. On May 10, 2005, Lieutenant Gordon Howey met with Plaintiff to discuss the charges against him. Based upon the results of this meeting, Lieutenant Howey prepared a

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2. Although the Defendant indicates the investigation followed a computer voice-stress analysis of the Plaintiff that indicated deception, the Court does not consider the results of that analysis for purposes of the pending motion as Defendant has failed to file an affidavit describing that analysis or one authenticating the exhibit purporting to be the results of the analysis.

report concluding that the allegation that Plaintiff was not truthful when he completed return-to-work paperwork was unfounded. Lieutenant Howey signed this report on May 17, 2005. On May 31, 2005, Kennetha Sawyers, the Director of OPA, signed Lieutenant Howey's report. Chief of Police Ronal Serpas accepted Mr. Howey's conclusions, and the director of OPA, Kennetha Sawyers, closed the investigation into Plaintiff on July 22, 2005. Additionally, on July 22, 2005, Ms. Sawyers sent Plaintiff a letter stating that OPA had completed its investigation and determined that the charges against him were unfounded.

Also, on July 22, 2005, Metro informed Plaintiff that the Peace Officer Standards Training ("POST") Commission, which certifies Metro police officers, did not accept his discharge. At that time, a Police Department employee named Calvin Hullett served as the POST Commission chairman. Metro "specifically" did not request a waiver for Plaintiff from the POST Commission.

After sending Plaintiff the July 22, 2005 letter, Ms. Sawyers states that she continued to be troubled by the disconnect between Plaintiff's description of the events leading to his discharge, and the severity of his punishment. Accordingly, in mid-August Ms. Sawyers contacted a representative from the U.S. Army to request additional documents and information from Plaintiff's file. During this conversation, Ms. Sawyers discovered that the DD-214 Plaintiff submitted to the Metropolitan Government appeared to have been

"altered." Plaintiff contends that the difference between the official copy and the one he submitted to Metro does not constitute an "alteration." Based upon this new information, Ms. Sawyers requested a copy of Plaintiff's DD-214 from the Tennessee Department of Veteran's Affairs.

On September 1, 2005, Georgia Norman, chief of War Records, sent OPA a copy of Plaintiff's DD-214 via facsimile. The form submitted by the Plaintiff to Metro omitted a few boxes at the bottom, including Box 28, which listed Plaintiff's "Narrative Reason for Separation" as "in lieu of trial by court martial." The form also omitted Blocks 29 and 30.

During his deposition testimony and in response to Defendant's requests for admission, Plaintiff admitted that he did not provide a complete copy of his DD-214 to Metro. Each DD-214 contains the following language in the top right hand corner: "Any alterations in shaded areas render form void." Box 28 of the DD-214 is a shaded area. During his deposition, Plaintiff testified that when he copied his DD-214, the copy was enlarged, which cut off Boxes 28, 29 and 30. He testified that he did not intentionally enlarge the form. Later in the deposition, Plaintiff said he could not remember if he intentionally removed Boxes 28, 29 and 30. In his response to a Request for Admission, however, Plaintiff stated that he "caused [the] form to be enlarged on a copying machine thinking that the relevant portion of that document would be more readable to the Defendant."

Metro contends that this new information received by Ms. Sawyers led to OPA's second investigation into Plaintiff's conduct, which focuses on whether Plaintiff intentionally altered the DD-214 he provided to the Metropolitan Government. Plaintiff contends that the actual reason for the second investigation was to retaliate against the Plaintiff for filing this lawsuit. When Ms. Sawyers conducted the follow-up research that lead to OPA's second investigation of Plaintiff's conduct, Plaintiff had not filed a lawsuit, and Ms. Sawyers was not aware that he was contemplating filing a lawsuit. Plaintiff points out that Ms. Sawyers' research ended five days before he filed suit, on September 6, 2005, and that Ms. Sawyers knew about the lawsuit before Metro filed its second Notice of Complaint against the Plaintiff on October 21, 2005. Plaintiff told superiors that he was contemplating a lawsuit months before he filed it.

Since approximately October 10, 2005, Defendant has assigned Plaintiff to the Central Station "bubble," where he has continued answering telephone calls from the public. Traditionally, Metro staffs the bubble with officers facing discipline or who are otherwise "disempowered."

On December 21, 2005, Plaintiff requested Metro's permission to return to his off-duty security jobs at South Street and Bound'ry. Metro denied Plaintiff's request for off-duty employment.

Petty v. Metro. Gov't of Nashville-Davidson, No. 3:05-0680, 2006 WL 3333509 at *1-5, 2006 U.S. Dist. LEXIS 83787 at *2-16 (M.D.Tenn. Nov. 16, 2006) (internal citations omitted; footnotes in original). Pertinent to this appeal, Petty's complaint alleged that Metro violated his rights under USERRA in that: (1) Metro delayed rehiring him for the purpose of subjecting him to the department's return-to-work process; (2) Metro did not properly rehire him because he was not placed in the position to which he was entitled; and (3) Metro impermissibly denied him the ability to work off-duty security jobs. These claims were asserted as violations of the reemployment provisions of USERRA, §§ 4312-4313, and the antidiscrimination provision of the Act, § 4311. Both parties moved for summary judgment. Petty's motion was denied, and the district court granted Metro's motion on all claims except those arising from the denial of Petty's request for off-duty work. The off-duty work claims proceeded to a bench trial, at the conclusion of which the district court entered a judgment on partial findings in favor of Metro. Petty now appeals.

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir.1999) (en banc). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To withstand summary judgment, the nonmoving party must present sufficient evidence to create a genuine issue of material fact. *Daniels v. Woodside*, 396 F.3d 730, 734 (6th Cir.2005). "A mere scintilla of evidence is insufficient; 'there must be evidence on which the jury could reasonably find for the [non-movant].' " *Id.* at 734-35 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Summary judgment is appropriately entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the law and record makes it appropriate, we may not only reverse the district court's entry of summary judgment, but we may instruct the district court to enter summary judgment against the previously victorious party. *See, e.g., Daniels*, 396 F.3d at 737.

A different standard is applied to the entry of a judgment on partial findings. The district court is not required to draw any special inferences, and it is permitted to weigh the evidence and resolve any conflicts therein. *Int'l Union of Operating Eng'rs, Local Union 103 v. Indiana Constr. Corp.*, 13 F.3d 253, 257

(7th Cir.1994). On appeal, we review legal determinations de novo and the relevant findings of fact for clear error. *Sharp ex rel. Estate of Sharp v. United States*, 401 F.3d 440, 443 (6th Cir.2005).

III. STRUCTURE OF USERRA

Statutory protection of job security for armed services members has a long history, dating back to the Selective Training and Service Act of 1940. USERRA is the latest iteration of these protections, and was enacted in part as a result of Congress's finding that "existing veteran's right statutes [were] overly complex and ambiguous, leaving veterans and employers confused as to their rights and responsibilities." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir.2006) (quoting *Lapine v. Town of Wellesley*, 970 F.Supp. 55, 58 n. 2 (D.Mass.1997)). Congress thus sought "to clarify, simplify, and where necessary, strengthen the existing veterans' employment and reemployment rights provisions." *Id.* Courts have recognized that "[b]ecause USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries." *Francis*, 452 F.3d at 303 (alteration in original). Relevant pre-USERRA case law is properly considered as a guide to interpreting USERRA. *Id.*

For the purposes of this case, USERRA performs four key functions. First, it guarantees returning veterans a right of reemployment after military service.

38 U.S.C. § 4312. Second, it prescribes the position to which such veterans are entitled upon their return. 38 U.S.C. § 4313.[3] Third, it prevents employers from discriminating against returning veterans on account of their military service. 38 U.S.C. § 4311. Fourth, it prevents employers from firing without cause any returning veterans within one year of reemployment. 38 U.S.C. § 4316.

At times, the interplay among these provisions has caused some confusion. *Compare Curby v. Archon*, 216 F.3d 549, 557 (6th Cir.2000) (stating that to recover for a reemployment violation under § 4312, a plaintiff also must show discrimination under § 4311) *with Wrigglesworth v. Brumbaugh*, 121 F.Supp.2d 1126, 1133-39 (W.D.Mich.2000) (concluding that recovery under § 4312 is separate from and not in any way dependent upon § 4311). We find helpful the Eighth Circuit's description of the relationship among the provisions at issue in this case:

> Section 4312 protects service members at the instant of seeking reemployment, entitling the service member to reemployment in either the position she would have been in had she not left for military service "or a position of like seniority, status and pay, the duties of which the person is qualified to perform."

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3. Due to the close relationship of § 4312 and § 4313, throughout this opinion we often refer to them collectively as USERRA's reemployment provisions.

> 38 U.S.C. § 4313(a)(2)(A) (defining rights set forth in § 4312, which entitles a person to be rehired upon return from military service). Section 4311 applies after reemployment has occurred and "prohibits discrimination with respect to any benefit of employment against persons who serve in the armed services after they return from a deployment and are reemployed." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir.2006) (noting that § 4312 protects military members up to the instant of reemployment while other sections of USERRA, such as § 4311 and § 4316, protect the member after reemployment occurs).[4]

Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 930 (8th Cir.2007). We will use this understanding of USERRA to examine Petty's claims.

IV. REEMPLOYMENT CLAIMS

As it pertains to this case, USERRA's right to reemployment encompasses two guarantees that are

4. The actual language of § 4311 may not limit its application to returning veterans. *See, e.g., Coffman v. Chugach Support Servs.*, 411 F.3d 1231, 1234 (11th Cir.2005) ("Section 4311 prohibits employers from discriminating against employees on the basis of military service and retaliating against individuals, whether service members or not, who testify or give statements on behalf of a USERRA claimant."). Such differences, however, do not affect the current case.

embodied in §§ 4312 and 4313. Section 4312 sets forth the basic right of a returning veteran to be rehired by his past employer and the basic prerequisites that the veteran must meet in order to enjoy that right. Section 4313 sets forth the position of employment to which the returning veteran must be rehired and requires that the veteran be "promptly reemployed" in that position. As briefly discussed above, Petty alleges that Metro violated his reemployment rights by: (1) impermissibly delaying his rehiring due to the department's return-to-work process; (2) failing to rehire him in the position to which he was entitled; and (3) impermissibly denying him permission to work off-duty security jobs. We find that Petty is entitled to summary judgment with respect to his first two claims; the third, which we will analyze separately, is not properly asserted as a reemployment claim under §§ 4312 and 4313.

A. Petty's First Two Claims-Delay in Rehiring and Failure to Hire at Proper Position:

Congress has clearly prescribed the prerequisites Petty was required to satisfy to qualify for USERRA's reemployment protection. First, he was required to notify his employer in advance of his departure that he would be leaving for military service. 38 U.S.C. § 4312(a)(1). Second, the cumulative length of such military service must be less than 5 years. 38 U.S.C. § 4312(a)(3). Third, upon his return, he was required to request reemployment from Metro within the time frame outlined in § 4312(e) and with the documentation specified by § 4312(f). Fourth, his separation from

service must have been under "honorable conditions." 38 U.S.C. § 4304(2). Metro contends only that Petty failed to provide the documentation requirements of § 4312(f)(1), which provides that upon the request of the employer, the returning veteran shall provide documentation establishing that he has satisfied these four prerequisites.

In 20 C.F.R. § 1002.123, the Department of Labor lists documents that satisfy the documentation requirements of 38 U.S.C. § 4312. Among those listed is a form DD-214, which Metro concedes Petty provided. But Metro argues that Petty's DD-214 is not sufficient, because the copy of the form that Petty sent Metro did not include three fields at the bottom of the form-most notably one including the statement "Narrative Reason for Separation: In lieu of trial by court-martial." Furthermore, Metro argues, the DD-214 was "void" because the failure to include all fields constituted an alteration voiding the form. Petty counters that his DD-214 included all the information necessary under the documentation requirements of § 4312(f)(1).

We conclude that it would be inconsistent with the goals of USERRA to prevent Petty from exercising his right to reemployment because he failed to provide forthrightly information that is statutorily unnecessary to his establishing the right in the first place. First, 20 C.F.R. § 1002.123(a)(2) expressly recognizes that the types of documentation necessary to establish eligibility for reemployment may vary from case to case. The focus of USERRA is on securing rights to returning veterans,

not on ensuring that any particular documentation is produced. Second, in compliance with Metro's return-to-work process, Petty signed an authorization granting Metro unfettered access to all of his medical and military records, including a complete DD-214.[5] Accordingly, we find that Petty satisfied USERRA's documentation requirement, and, inasmuch as Metro does not dispute his having satisfied the other statutory prerequisites, it is apparent that he established his right to reemployment as guaranteed by §§ 4312 and 4313.

Metro, therefore, was not permitted to delay or otherwise limit Petty's reemployment rights in any way; in particular, Metro was not permitted to limit or delay Petty's reemployment by requiring him to comply with its return-to-work process. Section 4302(b) expressly states that USERRA "supersedes any . . . contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." By applying its return-to-work process to Petty, Metro not only delayed his reemployment, but as we shall explain, it also limited and withheld benefits to which Petty was entitled under USERRA.

It is of no consequence here that Metro believes it is obligated to "ensure that each and every individual

5. We express no opinion as to whether the employer may, consistent with USERRA's provisions, request such a waiver.

entrusted with the responsibility of being a Metropolitan Police Officer is still physically, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department." In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns. Metro does not question Petty's physical qualifications; instead, it questions only whether his conduct during his military service would disqualify him from returning to service in the police department. But Petty's separation from military service is classified as "under honorable conditions," which Congress has made clear suffices to qualify him for USERRA benefits, 38 U.S.C. § 4304(2). To the extent that his military service may have in fact left Petty unfit to carry out his duties as a police officer but is not reflected in the classification of his separation from service, USERRA would allow, after his reemployment, a "for cause" termination of that employment. 38 U.S.C. § 4316. Furthermore, Congress recognized USERRA would limit the ability of employers to rescreen returning veterans, but still chose to make this the general rule under USERRA. This is evident because, in certain circumstances, Congress altered this general rule to allow vetting of returning veterans before full rehiring. Section 4315 allows the heads of agencies listed under 5 U.S.C. § 2302(a)(2)(C)(ii)—e.g., FBI, CIA, NSA-to "prescribe procedures for ensuring that the rights under [USERRA] apply to employees of such agency." 38 U.S.C. § 4315(a). Congress did not grant similar discretion to local police departments; therefore, Metro's return-to-work process as applied to Petty was in violation of USERRA's reemployment provisions.

Appendix A

The district court determined that Metro's return-to-work procedures could be applied to Petty, finding that because they are applicable to all individuals regardless of military service, these procedures did not constitute "additional prerequisites." In this, the district court erred. First, § 4302(b) does not limit its superseding effect only to "additional prerequisites." It supersedes any "policy, plan, [or] practice" that "reduces, limits, or eliminates in any manner any right or benefit" provided by USERRA, "including," but not necessarily limited to, "the establishment of additional prerequisites." Second, Metro's return-to-work procedures *do* constitute "additional prerequisites" for returning veterans, because the procedures are in addition to the requirements Congress specified for the exercise of USERRA's reemployment rights. The district court apparently viewed the term "additional prerequisites" as meaning "additional to the *employer's* existing prerequisites," and concluded that Metro's procedures are not discriminatory because they apply to all individuals returning to the department. But this analysis is not appropriate for a claim brought under § 4312, and the superseding effect of § 4302(b) is not so limited; Metro's return-to-work procedures are indeed superseded by USERRA's reemployment provisions.

It is important to note that Petty was not required to make any showing of discrimination in order to sustain either of his reemployment claims. The district court incorrectly characterized part of Petty's reemployment claim-that part dealing with the position to which he was reinstated-as being part of his

discrimination claims and therefore held that it required a showing of discrimination. The district court did not state its authority for this, but Metro finds support for the court's view in the following language from this Circuit's decision in *Curby v. Archon:* "a person seeking relief under § 4312 must also meet the discrimination requirement contained in § 4311." 216 F.3d at 557. However, this language from *Curby* was merely dicta and is therefore not binding precedent. *See Wrigglesworth*, 121 F.Supp.2d at 1137 (characterizing this part of *Curby* as dicta); *Jordan v. Air Prods. & Chems., Inc.*, 225 F.Supp.2d 1206, 1208 (C.D.Cal.2002) (same). Furthermore, subsequent to *Curby*, the Department of Labor specified that "[t]he employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment." 20 C.F.R. § 1002.33; *accord Francis*, 452 F.3d at 303 ("[T]he procedural requirements of the two provisions differ. An employee proceeding under § 4311 has the burden of proving that the employer discriminated against him or her based on a status or activity protected by USERRA. 20 C.F.R. § 1002.22 (2006). Section 4312 imposes no such burden. 20 C.F.R. § 1002.33 (2006)."). Finally, the imposition of § 4311's discrimination requirement on a reemployment claim is not consistent with the plain language of §§ 4312 and 4313. Section 4313 states that any "person entitled to reemployment under section 4312"—which we have found Petty to be "shall be promptly reemployed in a position of employment in accordance with the" order of priority outlined in § 4313(a)(2). Thus, the express terms of

§ 4313 make its application contingent only on the prerequisites of § 4312, none of which include a showing of discrimination.

Because we have found that Petty met § 4312's prerequisites, and that § 4313 is applicable here notwithstanding any discrimination considerations, we must now determine whether Metro violated § 4313 in failing to rehire Petty at the appropriate level of employment. Section 4313 provides the order of priority for the placement of returning veterans:

> (2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—
>
> > (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or
> >
> > (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and

> pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
>
> . . . .
>
> (4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

38 U.S.C. § 4313(a). Metro does not dispute that Petty was not placed in any of the positions apparently mandated by § 4313 (e.g., his former position as patrol

sergeant). Rather, Metro argues only that it did not violate § 4313 because, having perhaps been dishonest in the return-to-work process, Petty may not be qualified to hold these positions. This argument is without merit.

At the point at which Petty was entitled to reemployment under §§ 4312 and 4313, Metro had no basis on which to question his qualifications. Petty had satisfied the only prerequisites to § 4313-those specified in § 4312-and Metro's attempt to impose additional prerequisites through its return-to-work process was, as we have already explained, wholly impermissible. *See*38 U.S.C. § 4302(b) (USERRA supersedes local policies). The process, then, including Petty's alleged "dishonesty" therein, cannot serve as a basis for delaying or otherwise limiting Petty's right to reemployment.[6]

Furthermore, Metro cannot avoid this conclusion by arguing that its second investigation into Petty's conduct during the return-to-work process had not been completed at the time of Petty's filing of this action, and Metro therefore had not been able to determine whether Petty was qualified for reemployment in his original position with the police department. First, investigations

6. It may be that dishonesty regarding military service and discharge on the part of a returning veteran would suffice to establish cause for termination under § 4316. However, such a conclusion is not obvious and it is not necessary for disposition of this case; we therefore express no opinion on this matter.

spawned by the improper application to Petty of the return-to-work process cannot serve to delay Petty's statutory right to reemployment if the prerequisites for reemployment have been met. Second, § 4313 includes a promptness requirement that Metro clearly violated notwithstanding any concerns that it may have harbored regarding Petty's truthfulness. "Prompt reemployment" required by § 4313(a) means reemployment

> as soon as practicable under the circumstances of each case. *Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment.* For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

20 C.F.R. § 1002.181 (emphasis added). Because of its return-to-work process, Metro took three weeks to "rehire" Petty, and even then it did not place Petty in the correct position as outlined in § 4313. Metro cannot justify these delays; neither a return-to-work process that has been superseded by statute nor any

investigations resulting from that process constitute the "unusual circumstances" that the Department of Labor has specified may justify a less timely reinstatement. 20 C.F.R. § 1002.181. Third, in any event, the burden of proving that a returning veteran is not qualified under § 4313 falls on the employer, not on the employee. *McCoy v. Olin Mathieson Chem. Corp.*, 360 F.Supp. 1336, 1339 (S.D.Ill.1973). Metro cannot defeat the "prompt reemployment" guarantee of § 4313 by engaging in never-ending investigations into Petty's qualifications. Indeed, courts have recognized that:

> It is presumed under the law that a veteran, who was qualified for his employment status upon its termination by his entry into the active military service of the United States, remains qualified to claim reemployment upon his discharge from such active military service. . . . An employer who refuses to reemploy a discharged veteran who has timely applied for reemployment has the burden of proving the veteran's disqualification for reemployment.

Id. Metro has never *proved* Petty's disqualification for reemployment. Indeed, even today, approximately three years after Petty originally sought reemployment, Metro simply argues that, pending the outcome of its second investigation, it believes that Petty *may* be unqualified. Metro has wholly failed to carry its burden of proving

Petty's disqualification and has therefore clearly violated § 4313.[7]

B. Petty's Third Claim-Denial of his Request for Off-Duty Work:

On appeal, Petty also argues that Metro denied him reemployment rights when it refused to approve his request for off-duty security work. Although it is not clear whether Petty made this argument to the district court, we will briefly explain why this claim is not properly asserted under §§ 4312 and 4313.

Section 4312 "only entitles a service person to immediate reemployment and does not prevent the employer from terminating him the next day or even later the same day." *Francis*, 452 F.3d at 304. Likewise, once the returning veteran is rehired, § 4312 does not prevent the employer from discriminating against him. "The apparent harshness of this result is addressed by the fact that §§ 4311 and 4316 operate to protect the employee as soon as [ ]he is reemployed." *Id.* Petty did not request permission to engage in off-duty work-and was thus not denied such permission-until approximately ten months after he was reemployed. Section 4312, therefore, is not implicated by Metro's denial of this request.

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7. At oral argument the parties indicated that Petty is no longer employed at Metro. This may limit the type of relief available to Petty on remand (e.g., placing Petty in the position of patrol sergeant may not be possible at this time); however, we leave these issues for the district court to determine.

Furthermore, notwithstanding the timing problem, Petty's ability to engage in off-duty security work is not the type of benefit protected by USERRA's right to reemployment. Section 4312 protects only a service person's right to reemployment, which in turn triggers § 4313's guarantee of the appropriate position of employment. Section 4313 protects only the service person's "seniority, status and pay." *See* §§ 4313(a)(2)(A), 4313(a)(2)(B). While the ability to perform off-duty work may well have been an added benefit of Petty's position at Metro, it is not part of Petty's "seniority, status and pay." Because §§ 4312 and 4313 do not protect the type of general "benefits" that would include Petty's off-duty work, this claim may not be brought under these provisions.[8] However, as we explain in the following

8. Although Petty does not cite § 4316, it provides that:

> A person who is reemployed under this chapter [38 USCS §§ 4301 et seq.] is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

38 U.S.C. § 4316(a). Even if Petty had cited this provision, its value to him is questionable. First, given that the benefits protected are only those "determined by seniority," this provision would appear to protect only benefits directly tied to his employment at Metro. Second, even if this provision does protect benefits indirectly tied to employment, such as Petty's

(Cont'd)

section, the antidiscrimination provision of § 4311 is applicable.

V. DISCRIMINATION CLAIMS

Petty argues that claims for failure to rehire promptly, failure to rehire at the correct position, and denial of his request to perform off-duty work also constitute violations of USERRA's antidiscrimination provision, § 4311. We have already determined that Petty is entitled to summary judgment on his claims for failure to promptly and properly rehire under §§ 4312 and 4313; because he would obtain no added benefit from our addressing them under § 4311, we will not address them further. We will, however, examine his off-duty employment claim under § 4311. Because the district court erred in its legal analysis of this claim, and because it clearly erred in its finding that no evidence in the record supported this claim, we reverse its judgment on partial findings.

To begin, Petty's ability to engage in off-duty security work is the type of benefit protected under § 4311. As it pertains to these claims, § 4311 provides the following:

> (a) A person who is a member of, applies to be a member of, performs, has performed,

(Cont'd)
ability to engage in off-duty security work, the record contains no indication that this benefit is "determined by seniority," and it would therefore not be the type of benefit protected by § 4316.

applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or *any benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

. . . .

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service;

. . . .

38 U.S.C. § 4311 (emphasis added). The ability to obtain additional income by working as an off-duty security officer was certainly a "benefit" of serving as a Metro police officer, so any discrimination with respect to this benefit on account of Petty's military service would violate § 4311.

An individual bringing a § 4311 claim has the initial burden of proving a prima facie case of discrimination by showing, by a preponderance of the evidence, that his protected status was a substantial or motivating factor in the adverse employment action(s). The burden then shifts to the employer to prove the affirmative defense that the employment action(s) would have been taken in the absence of the employee's protected status. *See* 38 U.S.C. § 4311(c)(1); *Coffman v. Chugach Support Servs.*, 411 F.3d 1231, 1238-39 (11th Cir.2005); *Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir.1996).

For Petty's military service to have been "[a] motivating factor does not mean that it had to be the sole cause of the employment action. Instead, it is one of the factors that a truthful employer would list if asked for the reasons for its decision." *Coffman*, 411 F.3d at 1238. "[M]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration." *Id.*"[B]ecause USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries." *Francis*, 452 F.3d at 303; *accord Alabama Power Co. v. Davis*, 431 U.S. 581, 585, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977).

Metro argues that Petty was denied permission to engage in off-duty employment because he was being investigated at the time of his request and Metro has a policy against approving off-duty requests for officers under investigation. The district court concluded that

this policy was the motivating factor behind Metro's denial, that the policy was a legitimate reason and not a pretext for that decision, and that Metro's action was not discriminatory and did not violate USERRA. We conclude that the district court erred in its analysis.

In accepting Metro's justification regarding its policy, the district court failed to consider Metro's motivations for launching the investigation that triggered the policy's application to Petty in the first place. Because "[a] motivating factor does not mean that it had to be the sole cause of the employment action," *Coffman*, 411 F.3d at 1238, the fact that Metro had a legitimate reason for denying Petty's request does not prove that the denial did not also have an improper motivation. This is important in this case, because Petty came within the ambit of the "legitimate" policy only because he was under investigation. If that investigation was motivated by an improper purpose, then it follows that the denial of benefits on the basis of the investigation's existence was also motivated, at least in part, by an improper purpose.

The district court also erred in concluding "that the investigations by [Metro] were nondiscriminatory and did not violate USERRA." Metro has undertaken two separate investigations of Petty. The first was launched on April 14, 2005, to investigate concerns about Petty's honesty in disclosing the details of his military arrest and discharge. These concerns were determined to be "unfounded" in May of 2005, and the investigation was formally closed on July 22, 2005. The second

investigation was launched on October 21, 2005, and was aimed at determining whether Petty's submission of a form DD-214 with three fields missing violated department rules against the withholding of information. We will focus on the motivation behind this second investigation, as it was the one ongoing at the time of Petty's request for off-duty work and therefore responsible for triggering the policy requiring Metro to deny his request.

Metro contends that the second investigation generally concerns Petty's truthfulness, and more specifically, his submitting to the Police Department "an altered 'Certificate of Release or Discharge from Active Duty.' " In other words, Metro argues that this second investigation, although indirectly involving his military service, is solely motivated by concerns for Petty's honesty and truthfulness.

The district court concluded that "[t]he only evidence before the Court that [Petty]'s military status was a motivating factor in [Metro]'s decision is the opinion of [Petty] himself. . . ." We find this conclusion clearly erroneous. The record contains a chain of email correspondence that took place after the first investigation was concluded but prior to the second investigation. The following is an excerpt from that chain:

> We probably all need to put our heads together and decide if there are areas of conduct that occurred while he was away from

> the department (so off duty, but while serving in the military as Captain) that would constitute behavior for which we would not allow of any other off duty employee. I know we need every able bodied person we can get, but I do not want us to jump the gun and find ourselves embarrassed when his conduct comes under public scrutiny.

This message was sent by Deputy Chief Honey Pike to four individuals, including OPA Director Kennetha Sawyers, approximately two months after the OPA concluded a report finding no merit to concerns about Petty's honesty, and two days prior to Sawyers' formally closing that investigation. Approximately one month after this message was sent, Sawyers decided to do some independent "digging" by calling the Army to inquire further into Petty's service and discharge. This inquiry revealed that the DD-214 submitted by Petty had three fields omitted at the bottom of the document, and this discovery prompted Metro's second investigation.

This email establishes: (1) that after the first investigation was complete, there was still concern regarding Petty's *conduct in service*, not his honesty, amongst those who initiated the second investigation, and (2) that the informal investigation that led to the second, formal investigation was quite possibly motivated by those concerns about Petty's military service. Indeed, Sawyers' testimony appears to confirm this latter point; she testified that she continued to investigate Petty—even after signing off on the first

investigation's conclusion that the concerns about his honesty were "unfounded"—because she was "uncomfortable with the fact that [Metro] [was] not able to get as much information as [she] wanted with regard to the actual circumstances" of Petty's offense and discharge.

In reaching a judgment on partial findings, a district court must weigh and balance the evidence—all of the evidence. Because the district court failed to do that here, we vacate the judgment on partial findings, and remand to the district court Petty's discrimination claim brought under § 4311.

VI. CONCLUSION

For the foregoing reasons, we **REVERSE** the order of the district court granting summary judgment to Metro on Petty's claims that Metro violated his rights under 38 U.S.C. §§ 4312 and 4313 by failing to reemploy him promptly and properly, and we **VACATE** the order of the district court granting a judgment on partial findings to Metro with respect to Petty's § 4311 discrimination claim. We **REMAND** this matter to the district court with instructions to enter summary judgment in favor of Petty on the reemployment claims and to determine the resultant damages, and with regard to the discrimination claim, to conduct further proceedings not inconsistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION FILED MAY 23, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

NO. 3:05-0680
JUDGE CAMPBELL

BRIAN PETTY

v.

METROPOLITAN GOVERNMENT OF NASHVILLE-DAVIDSON COUNTY

ORDER

This matter was tried, without a jury, on May 22 and May 23, 2007. At the conclusion of the Plaintiff's proof, Defendant moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 52. For the reasons stated from the bench and herein, Defendant's motion for judgment as a matter of law is granted, and this action is dismissed.

Rule 52(c) provides that if, during a trial without a jury, a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim that cannot under the controlling law be maintained. Fed. R. Civ. P. 52(c). In accordance

with Fed. R. Civ. P. 52(a), the Court sets forth the following findings of fact and conclusions of law which constitute the grounds for its decision.

The single issue before the Court at trial is whether Defendant discriminated against the Plaintiff under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") by refusing to allow Plaintiff the privilege of engaging in extra-duty work. The issues of whether Defendant otherwise violated USERRA were decided at the summary judgment stage, and those rulings are the law of this case.

Under USERRA, the Plaintiff has the burden of showing that his military service was a motivating factor in the Defendant's denial of Plaintiff's request for extra-duty employment. *Curby v. Archon*, 216 F.3d 549, 556-57 (6th Cir. 2000). To establish that a certain factor is a motivating factor, a claimant need not show that it was the sole cause of the employment action, but rather that it is one of the factors a truthful employer would list if asked for the reasons for its decision. *Martin v. Autozone, Inc.*, 411 F.Supp. 2d 872, 879 (S.D. Ohio 2005).

The credible evidence at trial showed that the motivating factor for Defendant's refusal to allow Plaintiff to engage in extra-duty work was the Defendant's policy, reflected in General Order No. 99-09, that employees on administrative assignment pending the completion of an investigation shall not engage in extra-duty employment. As testified by Officer Gordon Howie, Kennetha Sawyers, and Chief Ronald

Serpas, and as evidenced by certain e-mails entered into evidence as Defendant's Exhibit 7, Plaintiff was denied extra-duty work because he was on administrative status pending the outcome of an investigation.

The only evidence before the Court that Plaintiff's military status was a motivating factor in Defendant's decision is the opinion of the Plaintiff himself, who testified that he believed he was discriminated against because of his military discharge. Although Officer Howie testified that it was not Defendant's policy to investigate every less-than-honorable discharge and that this investigation was specific to Plaintiff, this argument misses the point. The *investigation* is not the "adverse employment action" at issue herein. The Court has already found that the investigations by Defendant were non-discriminatory and did not violate USERRA. The only alleged adverse employment action remaining for trial is the refusal to allow Plaintiff to participate in extra-duty work.

For these reasons, the Court finds that Plaintiff failed to establish a prima facie case of discrimination under USERRA.

Alternatively, the Court finds that Defendant's asserted reason — the policy — is a legitimate reason and not pretext. There is a factual basis for the policy and a factual basis for finding that Plaintiff fell within the policy. As Chief Serpas and others testified, the police department cannot permit an officer who is not authorized to exercise full police powers on the job to exercise police powers for a private employer.

Appendix B

Plaintiff was on administrative status pending the outcome of an investigation when he requested permission for extra-duty work. Plaintiff admitted in his testimony that he was on administrative assignment at "the bubble," as police officers call this location. The Court also credits the testimony of Chief Serpas that, even if Plaintiff never received a written assignment to administrative status, everyone in the police department knew that assignment to "the bubble" was an administrative assignment. The Court also finds, as a matter of fact, that the investigation into Plaintiff's honesty was not over in December of 2005, when Plaintiff requested extra-duty work. Indeed, Plaintiff himself contended at trial that the investigation is not over even today.

Because Plaintiff was on administrative assignment pending completion of an investigation, Plaintiff was not qualified, under Defendant's General Order No. 99-90, to engage in extra-duty employment. And, as this Court has previously found, individuals who serve in the military are not exempt by virtue of USERRA from demonstrating that they still satisfy the qualifications, which are applied to everyone, to hold such a demanding position.

Plaintiff's argument that Defendant's reasons for denying him extra-duty work have changed over time is without merit. The Court finds, based upon the credible testimony of Ms. Sawyers and Chief Serpas, that having limited police powers and being on administrative status pending the outcome of an investigation are, for these purposes, the same thing.

Plaintiff argues that extra-duty work was a benefit of employment which he held prior to his military service and therefore he was entitled to it upon return, no questions asked. USERRA does not give returning military veterans *more* rights than other returning employees; it prohibits discrimination against them based upon their military service. Defendant must treat Plaintiff no differently than any other returning employee, but it is not required to treat Plaintiff better.

For all these reasons, the Court finds that Defendant's Motion should be granted. This action is DISMISSED, pursuant to Fed. R. Civ. P. 52. This Order shall constitute the final judgment in this case pursuant to Fed. R. Civ. P. 58.

IT IS SO ORDERED.

s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION FILED NOVEMBER 16, 2006

UNITED STATES DISTRICT COURT
M.D. TENNESSEE
NASHVILLE DIVISION

No. 3:05-0680.

Nov. 16, 2006.

Brian PETTY

v.

METROPOLITAN GOVERNMENT
OF NASHVILLE-DAVIDSON.

MEMORANDUM

TODD J. CAMPBELL, District Judge.

I. *Introduction*

Pending before the Court are Plaintiff's Motion For Summary Judgment (Docket No. 22), and The Metropolitan Government's Cross-Motion for Summary Judgment (Docket No. 30). For the reasons set forth below, Defendant's Motion is GRANTED in part, and DENIED in part. Plaintiff's Motion is DENIED.

Specifically, the Court holds that Defendant is entitled to summary judgment on the following claims: (1) failure to promptly reemploy the Plaintiff; (2) failure to return Plaintiff to a patrol position during the pendency of the second investigation; and (3) retaliation. Plaintiff's discrimination claim regarding refusal to approve off-duty work remains for trial.

The Court hereby orders the parties to participate in alternative dispute resolution, pursuant to Rules 16.02 -16.08 of the Local Rules of Court. The Magistrate Judge shall issue all necessary orders to implement the type of alternative dispute resolution he selects as appropriate.

II. *Factual and Procedural Background*

Plaintiff Brian Petty brought this action against Defendant Metropolitan Government Of Nashville and Davidson County, Tennessee, alleging that the Metropolitan Police Department violated the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301-4334, by failing to reemploy him in accordance with the Act after his return from active duty with the United States Army. (Amended Complaint (Docket No. 15)).

The parties agree to the following facts: Plaintiff joined the Army National guard in 1986 and opted into the Army Reserve with the Army National Guard as his "reserve component" in 1989. (Defendant's Response To Plaintiff's Statement of Undisputed Material Facts,

at ¶ 1 (Docket No. 32)(hereinafter "Defendant's Response To Facts")). The Defendant hired the Plaintiff as a police officer on February 1, 1991. (*Id.*, at ¶ 2). In 1993, Metro assigned the Plaintiff to patrol the West sector of Nashville, where Plaintiff focused on crime prevention in housing projects. (*Id.*, at ¶ 3). Metro promoted the Plaintiff to the rank of sergeant in January, 2000, whereupon he started supervising other officers in the South sector. (*Id.*, at ¶ 4). After various reassignments, Plaintiff returned to patrolling the West sector in the fall of 2002, where he continued supervising other officers. (*Id.*, at ¶ 5).

All Metro police officers must get approval for off-duty work, and the Plaintiff sought and received Metro's approval to work as a security guard at the South Street and Bound'ry restaurants prior to his deployment. (*Id.*, at ¶ 6).

Plaintiff remained in the Army Reserve through 2003. (*Id.*, at ¶ 7). In October of 2003, the Army called Plaintiff at work to tell him that he "was being transferred to another unit to take command as they were being mobilized" for service in Operation Iraqi Freedom. (*Id.*, at ¶ 8). Plaintiff told his lieutenant at Metro, Kim Dillingham, of his upcoming military leave the same day that the Army informed him. (*Id.*, at ¶ 9). The week after the Army contacted him, the Plaintiff took his first trip to Chattanooga to begin preparations for deployment, and he stopped working at Metro altogether on November 30, 2003. (*Id.*, at ¶ 10).

Appendix C

On January 2, 2004, the unit Plaintiff commanded had its official mobilization ceremony. (Plaintiff's Response To Defendant's Statement Of Undisputed Material Facts (Docket No. 40), at ¶ 2 (hereinafter "Plaintiff's Response to Facts")). The next day the unit left for Fort Stewart, Georgia. (*Id.*). The unit was in Fort Stewart until roughly February 20, when it was transferred to Camp Navistar/Big Sky Oasis in Kuwait. (*Id.*).

The Army assigned the Plaintiff to run the "mayor's cell" at Camp Navistar. (Defendant's Response to Facts, at ¶ 11). Plaintiff's unit ran the camp on a day-to-day basis-moving supplies; setting out bottled water for soldiers; handling any problems with housing, etc. (Plaintiff's Response to Facts, at ¶ 3). The job also required Plaintiff to empty and store contraband from "amnesty boxes." (Defendant's Response to Facts, at ¶ 11).

In June or July, 2004, Command Sergeant Thomas Seuberling conducted a health and welfare inspection of Plaintiff's quarters. (Plaintiff's Response to Facts, at ¶ 4). During the initial inspection, CSM Seuberling found a five-gallon jerry can (which looks like a gas can) that Plaintiff was using to manufacture homemade wine. (*Id.*)[1]

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1. Many of the statements made by Mr. Seuberling in his affidavit regarding this incident in Kuwait contradict the Plaintiff's testimony, and are disputed by the Plaintiff. As credibility determinations are inappropriate for summary

(Cont'd)

Plaintiff claims that he had alcohol in his tent because CSM Seuberling asked him to obtain alcohol. (*Id.*, at ¶ 7). Specifically, Plaintiff claims that CSM Seuberling told him that he was negotiating with a Kuwaiti farmer to get him to cut down some trees that were blocking the camp's guard towers, and that the farmer would cut down the trees if he could get him some alcohol. (*Id.*; Defendant's Response to Facts, at ¶ 12).

Based upon CSM Seuberling's health and welfare inspection, and the resulting investigation, Plaintiff was charged with a violation of the Military Code of Justice. (Plaintiff's Response to Facts, at ¶ 10). Specifically, Plaintiff was charged with: (1) violation of a lawful order; and (2) conduct unbecoming an officer. (*Id.*) With regard to the first charge, Plaintiff was accused of violating U.S. Central command General Order 1A, in that he was in possession of, and manufactured, alcohol. (*Id.*, at ¶ 11). By Plaintiff's own admission, he was in possession of, and was manufacturing, alcohol. (*Id.*, at ¶ 12). Plaintiff testified in his deposition that his intent in manufacturing wine in his tent was "mainly" to use it as an incentive for the farmer to clear trees, but he acknowledged that he may have used the wine for his own consumption eventually. (*Id.*, at ¶ 13). Plaintiff also admits receiving bottles of alcohol while in Kuwait, and using them for personal consumption. (*Id.*, at ¶ 14).

(Cont'd)

judgment, and a factual finding as to the events that took place in Kuwait are unnecessary to the Court's decision, the Court does not rely on the disputed statements in Mr. Seuberling's affidavit.

Appendix C

With respect to the conduct unbecoming an officer charge, Plaintiff was accused of offering alcohol to enlisted soldiers. (*Id.*, at ¶ 15). By Plaintiff's own admission, he gave alcohol to a female enlisted soldier, Sergeant Melanie Barnhart. (*Id.*, at ¶ 16). Furthermore, by Plaintiff's own admission, he and Sergeant Barnhart drank together. (*Id.*) Plaintiff knew that giving alcohol to a soldier was a violation of General Order 1A. (*Id.*, at ¶ 17). Nevertheless, Plaintiff gave alcohol to Sergeant Barnhart anyway, and he drank with her. (*Id.*)

In late 2004, Plaintiff appeared in front of a military judge, where he was arraigned. (*Id.*, at ¶ 18). In lieu of going forward with court martial proceedings, Plaintiff submitted a request to resign his commission "for the good of the service."(*Id.*, at ¶ 19). When Plaintiff submitted his request to resign "for the good of the service," the Army relieved him of his command, meaning that he was relieved of his supervisory responsibilities. (*Id.*) Plaintiff was notified on January 15, 2005 that his resignation "for the good of the service" had been approved. (*Id.*, at ¶ 20). The Army formally dismissed all charges against him in January 2005. (Defendant's Response To Facts, at ¶ 14).

When he left active duty, Plaintiff received two versions of his Department of Defense Form DD-214. (*Id.*, at ¶ 21). One focuses on awards, commendations, and service dates, but does not include the "character of service." (*Id.*) The other includes the character of service. (*Id.*)

Appendix C

Plaintiff's discharge was characterized as "under honorable conditions (general)." (Defendant's Response To Facts, at ¶ 16). The Army returned Plaintiff to Fort Stewart, Georgia on or about February 1, 2005. (*Id.*, at ¶ 15).

Plaintiff visited Metro to request reinstatement on February 28, 2005.(*Id.*, at ¶ 17; Plaintiff's Response to Facts, at ¶ 22). The Police Department has a return-to-work process for officers who have been away from the Police Department for an extended period of time. (Plaintiff's Response To Facts, at ¶ 23). This return-to-work process applies to all officers who have been away from the Police Department for an extended period of time, regardless of the reason for their separation. (*Id.*) The Police Department's return-to-work process includes a personal history update questionnaire, a medical examination, a computer voice stress analysis, a drug screening, and a debriefing with a Police Department psychologist. (*Id.*, at ¶ 24; Defendant's Response To Facts, at ¶¶ 19-23). In addition, the Police Department requests that returning officers execute a medical records authorization, and for individuals returning from military duty, an authorization to obtain military records. (*Id.*) The purpose of the Police Department's return-to-work process is to ensure that every individual entrusted with the responsibility of being a Metropolitan Police Officer is still physically, emotionally, and temperamentally qualified to be a police officer after having being absent from the Department. (*Id.*, at ¶ 25).

Appendix C

One of the questions on the personal history questionnaire Plaintiff filled out during the return-to-work process asked: "During your absence were you arrested, charged, detained, or a suspect in any criminal action or military disciplinary action for any reason or do you have any action pending? If yes, explain in detail (use back if necessary)."(*Id.*, at ¶ 49; Defendant's Response To Facts, at ¶ 18). Plaintiff answered "Yes." (*Id.*, at ¶ 50). He also attached a narrative explanation of his response in which he admitted facing military charges in Kuwait. (*Id.*, at ¶¶ 50-51). The narrative description did not disclose: (1) that Plaintiff was accused of giving alcohol to an enlisted soldier; and (2) that Plaintiff was accused of manufacturing alcohol. (*Id.*, at ¶ 51).

Plaintiff did not receive any salary or benefits for the period of examination between February 28, 2005 and March 21, 2005. (*Id.*, at ¶ 25).

On March 21, 2005, Defendant returned the Plaintiff to work. (*Id.*, at ¶ 26). Defendant did not, however, return the Plaintiff to his original position of patrol sergeant, or a substantially similar position. (*Id.*, at ¶ 27). Plaintiff contends that he was assigned to an office job in which he primarily answered telephone calls from the public. (*Id.*, at ¶ 29). Defendant states that Plaintiff has also taken police reports, which is a duty that must be performed by a sworn police officer. (*Id.*).

The Metropolitan Police Department's Office of Professional Accountability ("OPA") serves the internal

affairs function of the Metropolitan Police Department. (Plaintiff's Response to Facts, at ¶ 30). OPA initiated an investigation focused on whether Plaintiff was honest and truthful when he completed return-to-work paperwork after returning from military service. (*Id.*, at ¶ 31).[2] The Police Department's "Disciplinary/ Corrective Action Grid" indicates that the Department has a zero tolerance for dishonesty. (Plaintiff's Response to Facts, at ¶ 52).

On April 14, 2005, Metro issued a Notice of Complaint to Plaintiff outlining these charges. (*Id.*, at ¶ 32; Defendant's Response to Facts, at ¶ 30). On May 10, 2005, Lieutenant Gordon Howey met with Plaintiff to discuss the charges against him. (Plaintiff's Response To Facts, at ¶ 33). Based upon the results of this meeting, Lieutenant Howey prepared a report concluding that the allegation that Plaintiff was not truthful when he completed return-to-work paperwork was unfounded. (*Id.*; Defendant's Response to Facts, at ¶ 31). Lieutenant Howey signed this report on May 17, 2005. (*Id.*; Plaintiff's Response To Facts, at ¶ 33) On May 31, 2005, Kennetha Sawyers, the Director of OPA, signed Lieutenant Howey's report. (*Id.*, at ¶ 34). Chief of Police Ronal Serpas accepted Mr. Howey's conclusions, and

2. Although the Defendant indicates the investigation followed a computer voice stress analysis of the Plaintiff that indicated deception, the Court does not consider the results of that analysis for purposes of the pending motion as Defendant has failed to file an affidavit describing that analysis or one authenticating the exhibit purporting to be the results of the analysis.

the director of OPA, Kennetha Sawyers, closed the investigation into Plaintiff on July 22, 2005. (Defendant's Response to Facts, at ¶ 33). Additionally, on July 22, 2005, Ms. Sawyers sent Plaintiff a letter stating that OPA had completed its investigation and determined that the charges against him were unfounded. (*Id.*; Plaintiff's Response To Facts, at ¶ 34).

Also, on July 22, 2005, Metro informed Plaintiff that the Peace Officer Standards Training ("POST") Commission, which certifies Metro police officers, did not accept his discharge. (Defendant's Response To Facts, at ¶ 34). At that time, a Police Department employee named Calvin Hullett served as the POST Commission chairman. (*Id.*, at ¶ 35). Metro "specifically" did not request a waiver for Plaintiff from the POST Commission. (*Id.*, at ¶ 36).

After sending Plaintiff the July 22, 2005 letter, Ms. Sawyers states that she continued to be troubled by the disconnect between Plaintiff's description of the events leading to his discharge, and the severity of his punishment. (Plaintiff's Response to Facts, at ¶ 35). Accordingly, in mid-August Ms. Sawyers contacted a representative from the U.S. Army to request additional documents and information from Plaintiff's file. (*Id.*, at ¶ 36). During this conversation, Ms. Sawyers discovered that the DD-214 Plaintiff submitted to the Metropolitan Government appeared to have been "altered." (*Id.*) Plaintiff contends that the difference between the official copy and the one he submitted to Metro does not constitute an "alteration." (*Id.*) Based upon this new

information, Ms. Sawyers requested a copy of Plaintiff's DD-214 from the Tennessee Department of Veteran's Affairs. (*Id.*, at ¶ 37).

On September 1, 2005, Georgia Norman, chief of War Records, sent OPA a copy of Plaintiff's DD-214 via facsimile. (*Id.*, at ¶ 38). The form submitted by the Plaintiff to Metro omitted a few boxes at the bottom, including Box 28, which listed Plaintiff's "Narrative Reason for Separation" as "in lieu of trial by court martial."(*Id.*, at ¶¶ 38,42). The form also omitted Blocks 29 and 30. (*Id.*, at ¶ 42).

During his deposition testimony and in response to Defendant's requests for admission, Plaintiff admitted that he did not provide a complete copy of his DD-214 to Metro. (*Id.*, at ¶ 41). Each DD-214 contains the following language in the top right hand corner: "Any alterations in shaded areas render form void." (*Id.*, at ¶ 43). Box 28 of the DD-214 is a shaded area. (*Id.*) During his deposition, Plaintiff testified that when he copied his DD-214, the copy was enlarged, which cut off Boxes 28, 29 and 30. (*Id.*, at ¶ 45). He testified that he did not intentionally enlarge the form. (*Id.*) Later in the deposition, Plaintiff said he could not remember if he intentionally removed Boxes 28, 29 and 30. (*Id.*, at ¶ 47). In his response to a Request for Admission, however, Plaintiff stated that he "caused [the] form to be enlarged on a copying machine thinking that the relevant portion of that document would be more readable to the Defendant."(*Id.*, at ¶ 46; Exhibit 4 to Docket No. 32 ("Petty Responses to Metro Discovery")).

Metro contends that this new information received by Ms. Sawyers led to OPA's second investigation into Plaintiff's conduct, which focuses on whether Plaintiff intentionally altered the DD-214 he provided to the Metropolitan Government. (*Id.*, at ¶ 39). Plaintiff contends that the actual reason for the second investigation was to retaliate against the Plaintiff for filing this lawsuit. (*Id.*) When Ms. Sawyers conducted the follow-up research that lead to OPA's second investigation of Plaintiff's conduct, Plaintiff had not filed a lawsuit, and Ms. Sawyers was not aware that he was contemplating filing a lawsuit. (*Id.*, at ¶ 40). Plaintiff points out that Ms. Sawyers' research ended five days before he filed suit, on September 6, 2005, and that Ms. Sawyers knew about the lawsuit before Metro filed its second Notice of Complaint against the Plaintiff on October 21, 2005. (*Id.;* Defendant's Response To Facts, at ¶¶ 39, 40). Plaintiff told superiors that he was contemplating a lawsuit months before he filed it. (*Id.*)

Since approximately October 10, 2005, Defendant has assigned Plaintiff to the Central Station "bubble," where he has continued answering telephone calls from the public. (Defendant's Response To Facts, at ¶ 37). Traditionally, Metro staffs the bubble with officers facing discipline or who are otherwise "disempowered." (*Id.*, at ¶ 38).

On December 21, 2005, Plaintiff requested Metro's permission to return to his off-duty security jobs at South Street and Bound'ry. (*Id.*, at ¶ 42). Metro denied Plaintiff's request for off-duty employment. (*Id.*, at ¶ 43).

Appendix C

III. *Analysis*

A. *The Standards for Considering Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 466 (6th Cir.2003).

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In determining whether the movant has met its burden, the Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir.2002).

In order to defeat the motion, the nonmoving party is required to show, after an adequate time for discovery, that there is a genuine issue of fact as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S.Ct. at

2553; *Meyers*, 341 F.3d at 466. To create a genuine factual issue, the nonmoving party must show "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc* ., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Although the nonmovant need not show that the disputed issue should be resolved in his favor, he must demonstrate that there are genuine factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id. See also Hopson*, 306 F.3d at 432.

A preponderance of the evidence standard is used in this determination. *Id.* Therefore, if the evidence offered by the nonmoving party is "merely colorable," or "is not significantly probative," the motion for summary judgment may be granted. *Id. See also Matsushita Electric*, 106 S.Ct. at 1356.

B. *USSERA*

Plaintiff alleges that the Defendant has violated USERRA in three distinct ways: (1) Defendant failed to promptly re-employ him in his original position or one of like status; (2) Defendant discriminated against Plaintiff on the basis of his military service; and (3) Defendant retaliated against the Plaintiff for enforcing his USERRA rights.

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1. *Reemployment*

Plaintiff alleges that the Defendant violated USERRA by failing to promptly reemploy him, and by failing to return him to patrol work.

Section 4312 of USERRA describes the reemployment rights of those who serve in military service:

> [A]ny person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—
>
> (1) the person . . . has given advance written or verbal notice of such service to such person's employer;
>
> (2) the cumulative length of the absence . . . by reason of service in the uniformed services does not exceed five years; and
>
> (3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

Appendix C

Section 4313(a) provides that "a person entitled to reemployment under Section 4312, upon completion of a period of service in the uniformed services shall be promptly redeployed in a position of employment . . ." The regulations interpreting this statute provide that:

> 'Prompt reemployment' means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

20 C.F.R. § 1002.181.

Plaintiff stopped working for Metro to report for military service on November 30, 2003, and completed his service on or about February 1, 2005. Plaintiff applied for reemployment on February 28, 2005, and actually returned to work on March 21, 2005. Thus, Plaintiff returned to work approximately three weeks after application for reemployment.

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Plaintiff argues that, based on the regulation cited above, the Defendant should have rehired him within two weeks after he applied for reinstatement, and that the delay of an extra week violates the statute's requirement that he be "promptly" redeployed.

Defendant argues that it redeployed the Plaintiff, in the words of the regulation, "as soon as practicable under the circumstances."Defendant points out that, as a police department, it is obligated to ensure that officers are physically and mentally capable of performing their duties. The Defendant specifically contends that the delay was caused by a need to investigate Plaintiff's statement on a return-to-work questionnaire that he was "arrested, charged, detained, or a suspect in any criminal action or military disciplinary action," and that he faced military charges in Kuwait. The Defendant also contends that a computer voice stress analysis of the Plaintiff indicated that he was being untruthful about the military charges against him.

Plaintiff counters that USERRA supersedes any department policy to determine if an officer is capable of performing his duties, and that any delay based on that policy is unreasonable.

As an initial matter, the Court concludes that Defendant did not violate USERRA by applying its return-to-work procedures to the Plaintiff. According to Deputy Chief Honey Pike, the return-to-work process is to "ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police

Officer is still physically, emotionally, and temperamentally qualified to be a police officer" after having been absent from the Department. (Affidavit of Chief Honey Pike, at ¶ 7)(attached to Docket No. 32)). Police officers carry weapons, are endowed with arresting and other authority by local governments, and are required to exercise sound judgment in volatile situations. Individuals who serve in the military are not exempt by virtue of USERRA from demonstrating that they still satisfy the qualifications to hold such a demanding position.[3]

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3. Plaintiff cites 38 U.S.C. § 4302(b) to support his argument. That section provides:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

The qualifications applied to the Plaintiff do not constitute "additional prerequisites," however, as the same qualifications are applied to individuals who have not served in the military. (Pike Affidavit, at ¶ 5). This section does not permit an unqualified individual to return to a position simply because he has served in the military.

In interpreting a predecessor statute to USERRA,[4] the Second Circuit recognized as much:

> The VRRA [the Veterans' Readjustment Assistance Act of 1974] should not be interpreted to forbid consideration of the same factors in determining whether the former employee is still qualified for employment. The statute is not intended to protect veterans' jobs in any and all circumstances; 'protection . . . is based upon the veteran's compliance with the reasonable and ordinarily accepted standards of personal conduct and performance of duty of all employees.' *McCormick v. Carnett-Partsnett Sys., Inc.*, 396 F.Supp. 251, 256 (M.D.Fla.1975).

Preda v. Nissho Iwai American Corp., 128 F.3d 789, 792 (2nd Cir.1997). *See also Roll v. U.S. Postal Service*, 78 Fed.Appx. 121, 123, 2003 WL 22344982 (Fed.Cir. Oct. 14, 2003)(Postal Service did not violate USERRA by requiring plaintiff to undergo background check and provide information regarding his discharge from military service "under honorable conditions.")

Furthermore, by stating that the employer is to re-employ a service person "as soon as practicable under

4. The parties agree that in interpreting USERRA, courts may rely on the case law developed under the VRRA, a predecessor statute. *Rogers v. City of San Antonio*, 392 F.3d 758, 762 (5th Cir.2004).

the circumstances of each case," Section 1002.181 provides the flexibility for application of such a return-to-work process to ensure that military service members are physically and mentally fit to resume their positions.

As for the three-week delay in reemploying the Plaintiff, the Court concludes that this period does not constitute a violation of the "prompt reemployment" requirement of the statute. Plaintiff's response to the return-to-work questionnaire that he had faced military charges while in Kuwait was an "unusual circumstance" making the two-week period set forth in the statute inapplicable.[5] In any event, three weeks is not an unreasonable amount of time for the Metropolitan Police Department to take in evaluating an individual who has been on active service and away from the Department for over a year. Accordingly, Plaintiff's "prompt reemployment" claim is without merit.

Next, Plaintiff contends that the Defendant should have assigned him to a patrol position upon his reemployment. Although Plaintiff makes this argument in connection with his "reemployment" claim, the Court concludes that it should be considered as part of his discrimination claim as Plaintiff admits he was

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5. As noted above, Defendant also relies on a document purporting to be the results of a computer voice stress analysis allegedly indicating that the Plaintiff was untruthful in explaining the military charges against him. The Court does not rely on this evidence in reaching its decision, however, as Defendant has offered no supporting affidavit.

reemployed, but claims he was not placed in a patrol position due to his military service.

2. *Discrimination*

Plaintiff argues that Defendant has discriminated against him by virtue of his military service because it denied him employment for three weeks, failed to return him to a patrol position, and denied him the privilege of engaging in part-time work.

Section 4311 of USERRA codifies the discrimination requirement as follows:

> (a) A person who is a member of . . . has performed, . . . or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any other benefit of employment by an employer on the basis of that membership, . . . performance of service . . .
>
> * * *
>
> (c) An employer shall be considered to have engaged in actions prohibited—
>
> (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a

> motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; . . .

In evaluating a discrimination claim under USERRA, the Sixth Circuit has explained that the plaintiff has the burden of showing that his military service was a motivating factor in the defendant's adverse employment decision:

> Section 4311 is a congressional response to the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981). In *Monroe*, the Supreme Court held that USERRA's antecedent, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 'was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated *solely by* reserve status.' *Id.* at 559, 101 S.Ct. 2510 (emphasis added). Congress amended the statute in 1994 to provide that a violation occurs when a person's membership in the uniformed services is *a motivating factor*, even if not the sole factor. *See Newport v. Ford Motor Co.*, 91 F.3d 1164, 1167 (8th Cir.1996) (noting that USERRA was enacted in response to *Monroe*

> and changed *Monroe's* 'sole cause' standard to a 'motivating factor' standard). Stated otherwise, Congress intended to lessen, but not eliminate, a veteran's obligation to show that the employer's adverse decision was related to his or her service in the armed forces. *See id.*

Curby v. Archon, 216 F.3d 549, 556 -57 (6th Cir.2000).

The Eleventh Circuit has described the proof need to establish that military service was a "motivating factor" for an employment action:

> A motivating factor does not mean that it had to be the sole cause of the employment action. Instead, 'it is one of the factors that "a truthful employer would list if asked for the reasons for its decision."'. . .'Indeed, [m]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.' . . . Circumstantial evidence plays a critical part in these cases, 'for discrimination is seldom open or notorious.' . . . The court can infer discriminatory motivation under the USERRA from a variety of considerations, such as:
>
> proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered

> reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.
>
> . . . 'When the employee has met this burden, the burden shifts to the employer to prove the affirmative defense that legitimate reasons, standing alone, would have induced the employer to take the same adverse action.' . . . This burden-shifting framework 'applies to both so-called "dual motive" cases and so-called "pretext" cases.' . . . 'Thus in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, by a preponderance of evidence, that the action would have been taken despite the protected status.'

Coffman v. Chugach Support Services, Inc., 411 F.3d 1231, 1238-39 (11th Cir.2005) (citations omitted).

As discussed above, the Court concludes that there is no genuine factual issue suggesting that the Plaintiff's military service was a motivating factor in the Defendant's decision to wait three weeks before reemploying him. On the contrary, the undisputed

evidence in the record is that the Plaintiff was required to undergo the same return-to-work process that those who had not served in the military were required to undergo. (Affidavit of Chief Honey Pike, at ¶ 5 (attached to Docket No. 32)). Thus, Defendant has shown that it would have taken the same action in the absence of Plaintiff's military status. Accordingly, the Defendant is entitled to summary judgment on Plaintiff's discrimination claim regarding the delay in reemployment.

As for Defendant's failure to return Plaintiff to a patrol position, Defendant argues that it is warranted in taking this action, at least until OPA concludes its second investigation, because Plaintiff's dishonesty has disqualified him for such a position.[6]

Section 4313(a)(2) provides that for those whose period of service exceeded 90 days, the employer is to place him:

> (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service; or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

6. Plaintiff argues that Defendant waived lack of qualification as an affirmative defense. As stated in an accompanying order, this argument is without merit.

> (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

38 U.S.C. § 4313(a)(2).[7] Section 4303(9) defines "qualified" as "having the ability to perform the essential tasks of the position." 38 U.S.C. § 4303(9).

Defendant argues that honesty is one of the qualifications for being a patrol officer, citing the Police Department's zero tolerance for dishonesty.[8] Plaintiff counters that he is "qualified" within the meaning of the statute, and that the Defendant has not shown he was dishonest.

---

7. Subsection (a)(4) indicates that an unqualified individual is to be placed in a position "which is the nearest approximation to" the positions described above "which such person is qualified to perform, with full seniority."

8. Plaintiff argues that USERRA prevents the Defendant from applying its zero tolerance policy for dishonesty to him. As noted above, USERRA does not prevent an employer from applying the same qualifications to individuals who have served in the military as its applies to all other employees.

Appendix C

Before addressing the parties' arguments, it is important to precisely identify the question at issue. Based on the factual record submitted by the parties, Defendant has decided only that Plaintiff may not be placed in a patrol position during the pendency of the second investigation. That is the only decision ripe for review by this Court. As the record does not indicate that the Defendant has made a final decision regarding the Plaintiff's status, the Court cannot determine whether any final decision is discriminatory.

Plaintiff argues that under USERRA, he is unqualified for a position only if he has demonstrated "dangerous or extreme behavior," citing *Lapine v. Town of Wellesley*, 167 F.Supp.2d 132 (D.Mass.2001), *aff'd*, 304 F.3d 90 (1st Cir.2002). The district court in *Lapine* stated that "[t]he cases that have addressed the issue have consistently held that a veteran is unqualified only if he has demonstrated dangerous or extreme behavior." 167 F.Supp.2d at 139 (footnote omitted). The court then cites two cases in which the plaintiff veteran is held to be unqualified under USERRA based on behavior, such as threatening to kill fellow employees and threatening to ruin his employer. *See Winfree v. Morrison, Inc.*, 762 F.Supp. 1310 (E.D.Tenn.1990); *Green v. Tho-Ro Products, Inc.*, 232 F.2d 172 (3rd Cir.1956). The court also cited a case involving a plaintiff who "was often drunk at work," *John S. Doane Co. v. Martin*, 164 F.2d 537 (1st Cir.1947), and a case involving a plaintiff who "committed fraud on his employment application," *Greathouse v. The Babcock and Wilcox Co.*, 381 F.Supp. 156 (N.D.Ohio 1974).

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This Court does is not persuaded that the *Lapine* court's restrictive definition of "qualified" under the provisions of USSERA is warranted. First, one of the cases cited by the *Lapine* court does not support its conclusion. As described by the court, the *Greathouse* case involved fraud on an employment application, which does not come to mind when one uses the terms "dangerous" or "extreme." Furthermore, this restrictive definition of "qualified" does not appear in the statute, and has not been used by other courts. *See Fullerton v. South King County Multi-Service Center, Inc.*, 72 F.3d 135 (9th Cir.1995). Indeed, the First Circuit, on appeal in *Lupine*, does not repeat the district court's statement that extreme or dangerous behavior are the *only* conditions that disqualify a veteran. 304 F.3d at 104 ("Courts have held that a veteran is not qualified to return to his former position if he demonstrates extreme or dangerous behavior.")

USERRA defines "qualified" as having the ability to perform the essential tasks of the position, and because dishonesty is a basis for termination under Defendant's policies for *all* police officers, the Court concludes that honesty is essential for the position. Thus, Defendant may apply this qualification to the Plaintiff.

Plaintiff alternatively argues that Defendant has not shown he was dishonest. As noted above, however, the Court need not decide that question. The precise issue before the Court is whether Defendant is warranted in investigating the Plaintiff's conduct, and in refusing to place him in a patrol position during the pendency of that investigation.

Appendix C

The undisputed facts indicate that Plaintiff failed to submit the portion of the DD-214 stating the narrative reason for his separation. Based on that conduct, the Defendant was warranted in conducting an investigation into the Plaintiff's honesty. As honesty is essential under departmental policy for a patrol officer, as discussed above, the Court concludes that Defendant was justified in refusing to place Plaintiff into a patrol position until the completion of the second investigation.

Although Plaintiff argues that the Defendant's decision was motivated by his status as a veteran, there is no evidence in this record that Plaintiff was treated differently than non-veteran return-to-work applicants who have failed to provide complete paperwork about past charges, or similar conduct. There is also no evidence that Defendant expressed any hostility to the Plaintiff because he was a veteran, or that it treated veterans less favorably than other return-to-work applicants. That the alleged dishonesty in this case was about events that occurred while in military service does not exempt the Plaintiff from inquiry into whether he satisfied the requirement that he be truthful with his employer. The Court concludes that Defendant is entitled to summary judgment on Plaintiff's discrimination claim regarding his non-patrol status during the pendency of the second investigation.

Finally, Plaintiff argues that Defendant's refusal to approve his request for off-duty work was discriminating. The parties have failed to address, however, the factors to be used under departmental

policy in considering such a request, and the basis for Defendant's decision to refuse Plaintiff's request. Under these circumstances, the Court concludes that neither party is entitled to summary judgment on this claim.

3. *Retaliation*

Finally, Plaintiff argues that the Defendant retaliated against him for exercising his USERRA rights by launching the second investigation into his alleged dishonesty.

Section 4311(b) provides, in pertinent part, as follows:

> An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter; (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter; (3) has assisted or otherwise participated in an investigation under this chapter; or (4) has exercised a right provided for in this chapter . . .

In order to succeed on this claim, Plaintiff must show that his exercise of USERRA rights was "a motivating factor in [the Defendant's] action, unless [the

Defendant] can prove that the action would have been taken in the absence of [Plaintiff's USERRA complaints]."38 U.S.C. § 4311(c)(2); *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 309 (4th Cir.2006).

Plaintiff contends Defendant initiated its second investigation of his honesty in retaliation for his having made known to his superiors that he intended to file a lawsuit. Plaintiff relies heavily on the timing of the events involved-he filed suit on September 6, 2005, and Defendant issued its Notice of Complaint for the second investigation on October 21, 2005.[9]

The undisputed facts indicate, however, that Ms. Sawyers, the OPA Director, contacted the U.S. Army in mid-August, 2005 seeking additional documents from Plaintiff's file and learned that the DD-214 form submitted by Plaintiff appeared to have been altered. Ms. Sawyers received a copy of the DD-214 form on September 1, 2005. The second investigation was based on the alleged "alteration" of this form.[10] Although the

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9. Plaintiff cites *Brandsasse v. City of Suffolk, Va.*, 72 F.Supp.2d 608, 619 (E.D.Va.1999) for the proposition that an investigation of the plaintiff constitutes an adverse employment action under the statute. The Court assumes, and Defendant does not dispute, that the second investigation in this case constitutes an adverse employment action.

10. Plaintiff argues that the second investigation was simply a "repackaging" of the first investigation. The undisputed evidence indicates, however, that the first

(Cont'd)

Plaintiff indicates that he had told his superiors that he was contemplating a lawsuit before he filed suit on September 6, 2006, Ms. Sawyers' affidavit states that she was not aware Plaintiff was contemplating a lawsuit when she conducted the research leading to the second investigation. Plaintiff has offered no proof contradicting this statement.

Although Plaintiff argues that Deputy Chief of Police Pike may have had a role in pursuing the second investigation, he offers no evidence that Pike knew of the Plaintiff's lawsuit before any participation in that investigation, and certainly, no evidence that Pike's actions were motivated by the lawsuit.

Other than the timing of the events in question, Plaintiff has offered no evidence suggesting that Plaintiff's contemplation and actual filing of a lawsuit was a motivating factor in the Defendant's decision to open a second investigation into Plaintiff's honesty based on the alleged alteration of the DD-214 form.[11]

(Cont'd)

investigation was based on whether Plaintiff was honest and truthful when he completed the return-to-work paperwork, growing out of and the second investigation focused on whether the DD-214 form submitted by the Plaintiff had been "altered."

11. Plaintiff has offered no evidence supporting his suggestion that the retaliatory action was simply the issuance of the official Notice of Complaint, which occurred after the lawsuit was filed. In other words, Plaintiff has offered no proof that, in the absence of retaliation, the normal course of events would have been for the Defendant to halt its investigation into the DD-214 before officially opening the investigation.

See Francis, 452 F.3d at 309 ("Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.") Accordingly, Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

IV. *Conclusion*

For the reasons set forth herein, the Defendant's Cross-Motion for Summary Judgment is granted in part, and denied in part, and the Plaintiff's Motion For Summary Judgment is denied.

It is so ORDERED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 30, 2008

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-5649

BRIAN PETTY,

Plaintiff-Appellant,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY,

Defendant-Appellee.

ORDER

BEFORE: KENNEDY, BATCHELDER, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

Appendix D

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green
Clerk

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(2)

No. 08-965

FILED
MAR 2 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

METROPOLITAN GOVERNMENT OF NASHVILLE-DAVIDSON COUNTY,
Petitioner,

v.

BRIAN PETTY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

JAMES G. STRANCH, II
Counsel of Record
MICHAEL J. WALL
BRANSTETTER, STRANCH, & JENNINGS, PLLC
227 SECOND AVENUE NORTH
FOURTH FLOOR
NASHVILLE, TN 37201-1631
(615) 254-8801

Counsel for Respondent

March 2, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether a true conflict exists between the circuits concerning a veteran's "temperamental qualifications" under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4334 ("USERRA"), when the Sixth Circuit did not even reach this issue in its opinion.

2. Whether the Sixth Circuit's judgment about an extraordinary set of facts can possibly be read to increase the USERRA obligations of all employers, thereby raising an important issue of federal law worthy of the Court's attention.

3. Whether the non-final nature of the Sixth Circuit's decision and the ongoing litigation before the district court and civil service commission weigh against review at this time.

4. Whether Petitioner's perception of error in the Sixth Circuit's unanimous opinion, standing alone, warrants further review by this Court.

CORPORATE DISCLOSURE STATEMENT

Respondent is a natural person and, therefore, does not have any disclosure to make under Sup. Ct. R. 29.6.

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited in the Petition, this case requires consideration of the following:

38 U.S.C. § 4302. Relation to other law and plans or agreements

* * *

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4304. Character of service

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

(3) A dismissal of such person permitted under section 1161(a) of title 10.

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

38 U.S.C. § 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

* * *

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

* * *

38 U.S.C. § 4315. Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.

(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

(c) (1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.

(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.

(3) A determination pursuant to this subsection shall not be subject to judicial review.

(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.

* * *

REASONS FOR DENYING THE PETITION

The Court has no reason at all—and certainly none of the "compelling reasons" identified in Sup. Ct. R. 10—to grant review to Petitioner Metropolitan Government of Nashville-Davidson County ("Metro"). Metro has unsuccessfully tried to manufacture a circuit split on an issue that the Sixth Circuit did not address. Furthermore, the decision below does not have major significance beyond the parties to the lawsuit. Metro brazenly violated the USERRA rights of Respondent Brian Petty ("Mr. Petty"), and the Sixth Circuit did not have to face any close questions about the meaning of the statute. The non-final nature of the Sixth Circuit's decision provides a further reason to deny the Petition. Developments below could easily interfere with this Court's review.

Though Metro makes an effort to fit within the criteria for a writ of certiorari, it principally tries to show that the Sixth Circuit made a mistake. The Sixth Circuit did not make a mistake. All members of the panel rejected Metro's position, and the full Sixth Circuit denied en banc review. More importantly, this Court does not devote its energy to error-correction, and it should not make an exception for this case.

I. The Sixth Circuit's Decision Does Not Create a Circuit Split

This Court has stressed the importance of not granting a writ of certiorari in the absence of "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ of certiorari after oral argument upon discovering that no circuit split actually existed). "'Precedent interpreting and applying the USERRA is sparse.'" *Lewis v. Rite of Passage, Inc.*, 217 Fed. Appx. 785, 786 (10th Cir. 2007) (quoting *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)). Given the recent vintage and clarity of the statute, the circuit courts have not yet had any major disagreements about its meaning. The Sixth Circuit's decision in this case, while adding to the sparse body of USERRA case law, does not create any conflict within it.

The Sixth Circuit began by adopting other circuit courts' views on the structure of USERRA and its various protections. *See In re Petty*, 538 F.3d 431, 439-40 (6th Cir. 2008) (citing *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir. 2006) and *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 930 (8th Cir.

2007)). It chose to "use this understanding of USERRA to examine Petty's claims." *Id.* at 440.

Metro claims to have found an inconsistency between the circuits relating to a veteran's qualifications for reemployment. According to Metro, the First and Second Circuits have required a veteran to be "temperamentally qualified" for a position, *see Lapine v. Town of Wellesley*, 304 F.3d 90, 103 (1st Cir. 2002), *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 792 (2d Cir. 1997), whereas the Sixth Circuit only requires that a veteran have a non-disqualifying military discharge and be physically qualified. Pet. Cert. at 29-32.

The Sixth Circuit clearly did not intend to contradict the First and Second Circuits on this issue. Notably, it did not even cite *Preda*. It did cite the district court decision in *Lapine* but for an entirely different proposition that it accepted. *See In re Petty*, 538 F.3d at 439. Metro brought these cases to the Sixth Circuit's attention and urged it to address temperamental qualifications, but the court found that unnecessary.

One cannot infer a circuit split from the language of the Sixth Circuit's opinion, either. A returning veteran's qualifications play a limited role in the USERRA analysis; they determine, in part, the reemployment position to which he or she is entitled. A veteran like Mr. Petty, whose period of service was more than 90 days, "shall be promptly reemployed in a position of employment in accordance with the following order of priority":

> (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or
>
> (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

38 U.S.C. § 4313(a)(2).

"In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service." 20 C.F.R. § 1002.192. "The employer must make reasonable efforts to help the employee become qualified to perform the duties of [the reemployment] position." *Id.* § 1002.198.

If, despite reasonable efforts by the employer, the veteran cannot qualify for either the escalator position or his original position, then he should enter the position that most nearly approximates the escalator, then the original position. 38 U.S.C. § 4313(a)(4).

USERRA narrowly defines qualifications to include only essential skills and characteristics. "The term 'qualified', with respect to an employment position, means having the ability to perform the essential tasks of the position." *Id.* § 4303(9). According to USERRA's legislative history, the provision for employees who do not qualify for their original positions "is primarily intended to deal with employees who return to technologically-advanced situations for which they cannot qualify . . . ." H. R. Rpt. 103-65, at 32, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2465.

To clarify, the Sixth Circuit did not hold that Mr. Petty qualified for his original job as patrol sergeant because he had a particular type of discharge. Mr. Petty's discharge under honorable conditions satisfied one of the four basic prerequisites for USERRA coverage—an issue preliminary to choosing the correct reemployment position. *In re Petty*, 538 F.3d at 440-41; *see* 38 U.S.C. § 4304(2).[1] The court repeated this in its discussion of Mr. Petty's qualifications for patrol only because Metro had blurred the two issues. The Sixth Circuit brushed aside Metro's doubts about Mr. Petty's qualifications because they all revolved around his conduct in the military. The military, not Metro, had authority to judge Mr. Petty's service, and it classified his discharge as under honorable conditions.

---

[1] Metro argued that Mr. Petty failed to provide adequate documentation of his discharge because the DD-214 form he submitted was missing three fields at the bottom. *In re Petty*, 538 F.3d at 440-41. The Sixth Circuit concluded "that it would be inconsistent with the goals of USERRA to prevent Petty from exercising his right to reemployment because he failed to provide forthrightly information that is statutorily unnecessary to his establishing the right in the first place." *Id.* at 441.

See In re Petty, 538 F.3d at 441 ("But Petty's separation from military service is classified as 'under honorable conditions,' which Congress has made clear suffices to qualify him for USERRA benefits, 38 U.S.C. § 4304(2)."). Having found that Mr. Petty met the requirements for coverage, the court determined that he should have been reemployed as a patrol sergeant. *Id.* at 443-44.

The Sixth Circuit did not decide whether USERRA contemplates temperamental qualifications because Metro had not carried its burden of proving any disqualification. The employer has the burden of proof on this issue. *Id.* at 444.

> Metro has never *proved* Petty's disqualification for reemployment. Indeed, even today, approximately three years after Petty originally sought reemployment, Metro simply argues that, pending the outcome of its second investigation, it believes that Petty *may* be unqualified. Metro has wholly faile[d] to carry its burden of proving Petty's disqualification and has therefore clearly violated § 4313.

Id. (emphasis in original). Because of Metro's total lack of evidence, the court had no need to distinguish between different types of qualifications.

The Sixth Circuit never held, either expressly or impliedly, that a veteran is qualified for a position so long as he can satisfy the physical demands. It noted, "Metro does not question Petty's physical qualifications; instead, it questions only whether his conduct during his military service would disqualify him from returning to service in the police

department." *Id.* at 441. Metro warps this into meaning that it would have to question Mr. Petty's physical qualifications to prove him unqualified. However, the court was only explaining what was not at issue in the case.

First, it was cutting through Metro's self-serving statements about its return-to-work process. Metro contended that it was "obligated to 'ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police Officer is still *physically*, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department.'" *See id.* (emphasis added). In remarking that Metro did not question Mr. Petty's physical qualifications, the court simply ruled out one of the proffered justifications for Metro's policy so that it could proceed to the actual dispute.

Second, the court was keeping its analysis focused on the applicable provisions of the statute. The court determined Mr. Petty's reemployment position under 38 U.S.C. § 4313(a)(2), quoted above. *See id.* at 439-440, 443. USERRA contains separate, detailed provisions on the placement of veterans with disabilities. *See* 38 U.S.C. § 4313(a)(3). Hence, the court explained that Metro was not asserting a physical disqualification in order to prevent any confusion about the statutory framework.

The circuit courts do not disagree about USERRA. Metro disagrees with one of the circuit courts. This Court should conserve its limited resources for issues causing serious confusion in the judiciary.

II. This Case Does Not Present an Opportunity to Settle an Important Question of Federal Law

The Court does not "sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). It should only grant a writ of certiorari in "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *See Layne*, 261 U.S. at 393. The record shows an egregious disregard of Mr. Petty's USERRA rights, and the Sixth Circuit based its decision on the specific facts before it. Nobody disputes the importance of laws protecting veterans, but that does not make this case suitable for a hearing by this Court.

Metro has misrepresented the Sixth Circuit's holding in order to give it a broader application. According to Metro, "the Sixth Circuit held that USERRA prohibits employers from taking steps to determine whether returning veterans are 'qualified' to resume their jobs before returning them to work." Pet. Cert. at 23. The Court will struggle in vain to locate such a holding in the opinion. In reality, the Sixth Circuit held that "Metro's return-to-work process as applied to Petty was in violation of USERRA's reemployment provisions." *In re Petty*, 538 F.3d at 442. The Sixth Circuit has forbidden employers from acting as Metro did, not from evaluating veterans' qualifications altogether.

Metro abused the return-to-work process in a way that most employers would not attempt. It imposed numerous hurdles to Mr. Petty's reemployment. When Mr. Petty returned on March 21, 2005, it subjected

him to all manner of tests and reviews. *See id.* at 436 (return-to-work process included questionnaire, medical examination, computer voice stress analysis, drug screening, and a debriefing with a psychologist). It also required him to execute both medical and military records releases. *See id.* Nowhere does USERRA permit such tests and releases as part of the return-to-work process. The statute carefully sets out the veteran's responsibilities, *see* 38 U.S.C. § 4312(f)(1) (describing documentation that veteran must provide upon request), and those provisions supersede any local policy imposing "additional prerequisites," 38 U.S.C. § 4302(b).

Metro also drew out its investigations into Mr. Petty to justify not returning him to his original job. USERRA entitles veterans to be "promptly reemployed" in the mandated position. 38 U.S.C. § 4313(a). "'Prompt reemployment' means as soon as practicable," and "[a]bsent unusual circumstances," it must occur within two weeks. 20 C.F.R. § 1002.181. "Because of its return-to-work process, Metro took three weeks to 'rehire' Petty, and even then it did not place Petty in the correct position as outlined in § 4313." *In re Petty*, 538 F.3d at 444.

Metro began investigating Mr. Petty for not disclosing all of the circumstances of his discharge but concluded the investigation as "unfounded" within a few months. *Id.* at 436-37. It then began a second investigation into Mr. Petty's military history in August 2005, *id.* at 437, and still had not concluded that investigation by the time the district court entered summary judgment, *see id.* at 444 (noting that approximately three years had passed since Mr. Petty applied for reemployment). The Sixth Circuit rightly

concluded, "Metro cannot defeat the 'prompt reemployment' guarantee of § 4313 by engaging in never-ending investigations into Petty's qualifications." *Id.*[2]

Under the Sixth Circuit's decision, employers have the right to consider veterans' qualifications for a particular position. However, they cannot implement a return-to-work process that directly conflicts with the one outlined in USERRA. This is not a case in which the employer made a good faith effort to comply with several competing legal requirements.

Metro has alluded to other veteran's issues that have nothing to do with this case. It points to articles describing the prevalence of post-traumatic stress disorder and aggressive behavior among veterans. Pet. Cert. at 24-25. Metro did not claim in the lower courts that Mr. Petty suffered from these psychological problems. It only claimed that he might have been dishonest in the return-to-work process. *In re Petty*, 538 F.3d at 443. If Mr. Petty's military service had left him with a psychological disability, then other provisions of USERRA would have governed his reemployment rights. *See* 38 U.S.C. § 4313(a)(3); 20 C.F.R. § 1002.225. Metro cannot use the facts of other cases to justify review in this case.

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[2] Metro responds to the criticism of its slowness by foisting the responsibility onto Mr. Petty. *See* Pet. Cert. at 10 n.3. It cites as evidence its own brief to the Sixth Circuit and hearsay testimony by one of its witnesses during the bench trial on the off-duty work claim, testimony that was not part of the summary judgment record relevant to the reemployment claim. The parties did negotiate over the dates for certain meetings and such, but this cannot excuse years of delay by Metro.

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 184 (1959). No doubt, future USERRA cases will raise important questions of statutory interpretation and public policy. This one does not.

III. The Court Should Await a Final, Comprehensive Judgment in the Lower Courts

"We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States, Va. Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring). In support of this rule, the Court has explained that "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). The parties are still litigating multiple USERRA claims that involve Mr. Petty's experience in the return-to-work process—"a fact that of itself alone furnishe[s] sufficient ground for the denial of the application . . . ." *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Due to the inefficiencies and pitfalls of piecemeal litigation, the Court should not grant a writ of certiorari at this time.

Developments on remand may interfere with review by this Court. In addition to his reemployment claims, Mr. Petty alleged that Metro discriminated against him by denying him permission to engage in off-duty work as a private security guard. *In re Petty*, 538 F.3d at 438 The district court held a bench trial

on this claim and entered a judgment on partial findings for Metro pursuant to Fed. R. Civ. P. 52(c). *Id.* Because the district court failed to consider all of the evidence, the Sixth Circuit vacated the judgment on partial findings and remanded the claim for further proceedings. *Id.* at 448. Metro did not seek a stay of the Sixth Circuit mandate, and the case is actively proceeding before the district court.

Although Metro is not asking this Court to review the judgment on partial findings, any number of things could happen in the ongoing litigation that would make this Court's involvement fruitless. The parties may reach a settlement, thereby mooting the controversy after the Court begins studying it. If the Court found a genuine issue of material fact on the reemployment claim, it would presumably remand the claim for a trial. At that point, the district court may have already awarded Mr. Petty the relief he seeks on some other basis. Either party may make an admission or otherwise prejudice its case so as to warrant summary disposition, regardless of how this Court rules. One cannot anticipate all of the possibilities, but these few illustrate the wisdom of letting the case run its course. *Cf. Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case, [and] it is not yet ripe for review by this Court").

Metro has increased the problems of review by waiting to terminate Mr. Petty while the case was on appeal. Metro obtained summary judgment by telling the district court that it had good reasons to investigate Mr. Petty and should not have to return him to patrol until it finished. *See Petty v. Metro. Gov't*

of Nashville-Davidson, No. 3:05-0680, 2006 U.S. Dist. LEXIS 83787 at *29 (M.D. Tenn. Nov. 16, 2006) ("As for Defendant's failure to return Plaintiff to a patrol position, Defendant argues that it is warranted in taking this action, at least until OPA concludes its second investigation . . . ."). On December 7, 2007, approximately three weeks after the parties submitted their final briefs to the Sixth Circuit, Metro suddenly concluded its investigation and terminated Mr. Petty for being dishonest in the return-to-work process. The Sixth Circuit learned of this at oral argument but could not review his termination in the first instance. *See In re Petty*, 538 F.3d at 444 n.7. On remand, the district court has allowed Mr. Petty to supplement his complaint to include another USERRA claim for discriminatory and retaliatory discharge.[3]

Like the off-duty work claim, the termination claim can have unpredictable consequences. Mr. Petty is seeking reinstatement as a patrol sergeant with back pay. If the district court awards such relief, then this Court would effectively be deciding whether Mr. Petty gets a week or so of compensation for the delay in rehiring him when he first returned. *See In re Petty*, 538 F.3d at 448 (instructing district court to calculate damages on reemployment claim). The posture of the case makes review inappropriate at this time. Metro has no one but itself to blame; it engaged in gamesmanship precisely to avoid judicial review.

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[3] Mr. Petty also appealed his termination to the Metro Civil Service Commission, a local administrative agency that reviews personnel decisions under the Metro Charter and Metro Code. The parties have already presented evidence to an administrative law judge and are awaiting her decision about Mr. Petty's right to reinstatement and back pay.

The Court can review all aspects of the litigation once it reaches a final conclusion. *See Va. Military Inst.*, 113 S. Ct. at 2432; *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). It should not consider taking up the matter until that point.

IV. Metro's Misguided Arguments on the Merits Do Not Warrant Review

"[W]e must never forget that this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting). "We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review." *Board of Education v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting). The argument headings in Metro's Petition show that the principal basis for it is a perceived error by the Sixth Circuit. That alone cannot justify a writ of certiorari. Metro has no convincing argument on the merits, at any rate.

Metro wants to shape federal law to fit its return-to-work process, rather than conform itself to federal law. It cannot succeed because USERRA expressly preempts local laws and policies. *See* 38 U.S.C. § 4302(b). An employer does not have the freedom to demote a returning veteran while it conducts a sham investigation for several years.

To rule for Metro, the Court would have to graft a police department exception onto USERRA. Metro gravely discusses the role of police officers and its need for total discretion on personnel issues. However, it cannot reconcile this view with the text of the statute.

See In re Petty, 538 F.3d at 441 ("In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns."). Congress carved out an exception for employees in the federal intelligence-gathering community, giving agencies like the Federal Bureau of Investigation the discretion to decide whether reemployment is "impossible or unreasonable" without judicial review. *See* 38 U.S.C. § 4315(c)(1) and (3). Local police departments, by contrast, have to obey the same rules as private employers. If Metro disagrees with this policy, then it must petition Congress to change it. *See Burns v. Reed*, 500 U.S. 478, 493 (1991) (the Court should discern Congress' intent in enacting a statute, not make its own "freewheeling policy choice").

Finally, Metro cannot prevail on the qualifications issue because it did not attempt to qualify Mr. Petty for the patrol job. USERRA requires "reasonable efforts" by the employer to help qualify a veteran for the relevant position. *See* 38 U.S.C. § 4313(a)(2)(B) and (4)(B); 20 C.F.R. § 1002.198. The record discloses no effort whatsoever by Metro to do this. Mr. Petty raised this point to the Sixth Circuit, but the court did not address it in light of its other rulings.

CONCLUSION

Metro has not presented any compelling reason for the Court to grant the Petition. Therefore, Mr. Petty respectfully requests that the Petition be denied.

Respectfully submitted,

James G. Stranch, III
Counsel of Record
Michael J. Wall
BRANSTETTER, STRANCH, & JENNINGS, PLLC
227 Second Avenue North
Fourth Floor
Nashville, Tennessee 37201-1631
(615) 254-8801

Counsel for Respondent

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METROPOLITAN GOVERNMENT
OF NASHVILLE & DAVIDSON COUNTY,

Petitioner,

v.

BRIAN PETTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

SUE B. CAIN
Director of Law
JAMES L. CHARLES
Associate Director of Law
KEVIN C. KLEIN*
Assistant Metropolitan Attorney
DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
TENNESSEE
P.O. Box 196300
108 Metropolitan Courthouse
Nashville, Tennessee 37219-6300
(615) 862-6341

* *Counsel of Record* *Attorneys for Petitioner*

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Brian Petty's defense of the United States Court of Appeals for the Sixth Circuit's decision is based upon a misreading of the Court of Appeals' opinion and a misinterpretation of the Uniform Services Employment and Reemployment Act ("USERRA"), 38 U.S.C. §§ 4301-4334. USERRA does not prohibit employers from considering whether a returning veteran is qualified for a particular position. To the contrary, Section 4313(a) of USERRA dictates that an employer's obligation to reemploy a veteran in a particular position is contingent upon the veteran being "qualified" for the position. Nevertheless, the Sixth Circuit has foreclosed any meaningful review of returning veterans' qualifications by prohibiting any inquiry into veterans' qualifications.

Respectfully, the Court of Appeals erred in its interpretation of USERRA, and its decision has the potential to endanger the public. For these reasons, and as discussed in more detail below, the Metropolitan Government respectfully requests plenary review of this matter.

I. The Sixth Circuit's Decision is Inconsistent with the Text of USERRA, and it has the Potential to Endanger the Public

In its initial brief, the Metropolitan Government stated that "the Sixth Circuit held that USERRA prohibits employers from taking steps to determine whether returning veterans are 'qualified' to resume their jobs . . . ." Petition for Writ of Certiorari, p. 23. In his Opposition, Petty states that "[t]he Court will struggle in vain to locate such a holding it the opinion."

Petty's Opposition, p. 11. As set forth below, however, there is no other way to read the Sixth Circuit's opinion. Without question, the Sixth Circuit held that USERRA prohibits employers – even employers in safety-sensitive fields like local law enforcement – from taking steps to ensure that returning veterans are qualified to resume their jobs.

A. Contrary to the Sixth Circuit's Decision, USERRA Does Not Prohibit Employers from Considering Whether Returning Veterans Are Qualified for Reemployment

Throughout this case, the Metropolitan Government has argued that the Police Department not only has a right, but an obligation, to ensure that its officers are physically, mentally, and temperamentally fit for duty. The Sixth Circuit summarily dismissed this argument, stating:

> It is of no consequence here that Metro believes it is obligated to "ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police Officer is still physically, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department." In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns.

Petty v. Metropolitan Government, 538 F.3d 431, 441 (6th Cir. 2008). The Sixth Circuit then held that, notwithstanding the Police Department's perceived

obligation to ensure that returning veterans are still qualified, Petty was entitled to be reemployed as a police sergeant because he satisfied the prerequisites set forth in 38 U.S.C. § 4312. *Id.* at 443. Specifically, the Court stated:

> At the point at which Petty was entitled to reemployment under §§ 4312 and 4313, Metro had no basis on which to question his qualifications. Petty had satisfied the only prerequisites to § 4313 — those specified in § 4312 — and Metro's attempt to impose additional prerequisites through its return-to-work process was, as we have already explained, wholly impermissible.

Id.

In sum, the Sixth Circuit held that Petty was entitled to be reemployed as a patrol sergeant because he satisfied the prerequisites "specified in § 4312." *Petty*, 538 F.3d at 443. To clarify, the prerequisites "specified in § 4312" are: (1) giving advance notice of military leave; (2) having cumulative military leave of less than five years; (3) applying for reemployment within the specified time period; and (4) receiving a separation from service under "honorable conditions." *Petty*, 538 F.3d at 440-41. The Court of Appeals held that, because Petty provided these four pieces of information, the Police Department "had no basis on which to question his qualifications." *Id.* at 443.

This conclusion illustrates the fundamental disagreement between the parties, and the fundamental inconsistency between the Sixth Circuit's decision and the text of USERRA. Petty argued, and the Sixth Circuit held, that Section 4312 outlines the exclusive "return-to-work process" under USERRA: A returning veteran is only obligated to provide the four pieces of information identified in Section 4312, and employers are prohibited from requesting any additional information. *See* Petty's Opposition, pp. 11-12. The Metropolitan Government, on the other hand, submits that, while a returning veteran who provides the information identified in Section 4312 is entitled to "the reemployment rights and benefits" of USERRA, the analysis does not end there. To the contrary, the next section, Section 4313, dictates the specific "reemployment rights and benefits" to which a returning veteran is entitled. And under Section 4313, an employer's obligation to reemploy a veteran is contingent upon the veteran being "qualified" for the position. *See* 38 U.S.C. § 4313(a).

Nevertheless, the Court of Appeals held that "the only prerequisites to § 4313" are "those specified in § 4312." *Petty*, 538 F.3d at 443. Moreover, the Court held that the Police Department's return-to-work process "is superceded by USERRA's reemployment provisions." *Id.* at 442. In support of this conclusion, the Court cited 38 U.S.C. § 4302(b), which states that USERRA "supercedes any . . . contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the

receipt of any such benefit." 38 U.S.C. § 4302(b). The Court concluded that the Police Department's return-to-work procedures constitute "additional prerequisites," and thus, are superceded, because they are "in addition to the requirements Congress specified for the exercise of USERRA's reemployment rights." *Petty*, 538 F.3d at 442.

The flaw in the Sixth Circuit's analysis is that it conflates (1) whether a returning veteran is "entitled to the reemployment rights and benefits" of USERRA under Section 4312, and (2) whether a returning veteran is "qualified" for a particular position under Section 4313. These are distinct concepts governed by different sections of USERRA. Yet the Sixth Circuit held that the only prerequisites to reemployment are "those specified in § 4312." The inescapable result of this holding is that any inquiry into a returning veteran's "ability to perform the essential tasks of [a] position" is preempted by Section 4302(b) because it is in addition to the prerequisites to reemployment "specified in § 4312." *Petty*, 538 F.3d at 442-43.

The Sixth Circuit departed from the plain text of USERRA and rendered the "qualification" language in Section 4313(a) superfluous.[1] Moreover, despite Petty's

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1. The Sixth Circuit also cited 38 U.S.C. § 4315 for the proposition that federal intelligence agencies, and only federal intelligence agencies, may evaluate returning veterans' qualifications. *Petty*, 538 F.3d at 442. Section 4315 does not establish that only federal intelligence agencies may evaluate returning veterans' qualifications; it establishes that federal intelligence agencies, unlike other employers, "shall not be subject to judicial review" based upon their reemployment decisions. 38 U.S.C. § 4315(c)(3).

protestations to the contrary, the Sixth Circuit's decision has broad implications for all employers. Employers – even employers in safety-sensitive fields like local law enforcement – are now prohibited from ensuring that returning veterans are still qualified for their positions, regardless of any threat to the veteran, his or her co-workers, or the public. Local law enforcement agencies are precluded from satisfying their constitutional obligation to ensure that the officers they put on the street are qualified. *See, e.g., Bd. of County Comm'ns of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 411 (1997) (holding that a government official's failure to scrutinize an applicant's background may give rise to liability under 42 U.S.C. § 1983); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671 (1989) ("[T]he public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that a police department's failure to train or supervise officers may subject a municipality to liability under 42 U.S.C. § 1983); and *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999) (holding that a police department's failure to discipline for perjury may give rise to a cause of action under 42 U.S.C. § 1983). And the Sixth Circuit's holding goes far beyond law enforcement. Under the Sixth Circuit's analysis, any returning veteran must be put back to work if he or she provides the four pieces of information identified in Section 4312.

Respectfully, the Court of Appeals erred in its interpretation of USERRA, and its decision has the potential to endanger the public. For these reasons, the Metropolitan Government respectfully requests plenary review of this matter.

B. By Prohibiting any Inquiry into Returning Veterans' Qualifications, the Sixth Circuit has Foreclosed any Meaningful Review of Veterans' Qualifications

Recognizing that "qualification" is an essential component of the analysis under Section 4313, Petty is left to argue that, while the Sixth Circuit's decision prohibits employers from inquiring as to returning veterans' qualifications, it does not prohibit employers from considering whether returning veterans are qualified. Petty characterizes the Sixth Circuit's decision as follows: "Under the Sixth Circuit's decision, employers have the right to consider veterans' qualifications for a particular position. However, they cannot implement a return-to-work process that directly conflicts with the one outlined in USERRA." Petty's Opposition, p. 13.

To clarify, what Petty refers to as the "return-to-work process . . . outlined in USERRA" is nothing more than the veteran's obligation to provide the four pieces of information identified in Section 4312. Thus, what Petty is saying is that, while employers may consider returning veterans' qualifications, they may only do so insofar as returning veterans' qualifications, or lack thereof, are apparent from an examination of the four pieces of information identified in Section 4312. The problem with this analysis, however, is that an employer cannot divine whether a returning veteran is qualified for a particular position. For the qualification language in Section 4313(a) to serve any purpose, employers must be permitted to inquire as to returning veterans' qualifications.

Petty states that the qualification language in Section 4313 was "primarily intended to deal with employees who return to technologically-advanced situations for which they cannot qualify . . . ." Petty's Opposition, p. 8 (citations omitted). Even this characterization contemplates inquiry into a returning veteran's qualifications in "technologically advanced situations." But that is not what the Sixth Circuit held. The Sixth Circuit held that *any* return-to-work process – other than requesting the four pieces of information identified in Section 4312 – is unlawful. *Petty*, 538 F.3d at 443.

In its initial brief, the Metropolitan Government cited several articles describing the prevalence of post-traumatic stress and aggressive behavior in returning veterans. *See* Petition for Writ of Certiorari, pp. 24-25. Petty does not suggest that the information the Metropolitan Government cited is incorrect. Instead, he argues that "Metro cannot use the facts of other cases to justify review in this case." Petty's Opposition, p. 13.

Respectfully, how the Sixth Circuit's decision will impact other cases is squarely at issue when this Court determines whether a case merits consideration. In this case, by holding that employers are prohibited from implementing a return-to-work process, the Sixth Circuit has opened the door for psychologically unfit veterans to be returned to service as police officers. Petty argues that if a veteran is left with a psychological disability, "other provisions of USERRA would govern[] his reemployment rights." Petty Opposition, p. 13. While Section 4313(a)(3) outlines the procedure for reemploying veterans with disabilities, Petty's

argument ignores the fact that, absent some type of return-to-work process, employers will not know that a returning veteran has a disability, particularly a psychological disability.

By prohibiting any inquiry into returning veterans' qualifications, the Sixth Circuit has foreclosed any meaningful review of veterans' qualifications. In so doing, the Sixth Circuit departed from the text of USERRA. Because this issue is so important, the Metropolitan Government respectfully requests plenary review of this matter.

II. The Sixth Circuit's Decision Creates a Circuit Split on the Issue of What "Qualified" Means Under USERRA

In its initial brief, the Metropolitan Government argued that, to the extent the Sixth Circuit considered the issue of a returning veteran's "qualifications," it concluded that Petty was "qualified" to serve as a police sergeant because (1) he received a non-disqualifying discharge from the U.S. Army Reserves, and (2) his physical ability to perform the job was not at issue. *See* Petition for Writ of Certiorari, p. 29. Petty argues that "[t]he Sixth Circuit never held, either expressly or impliedly, that a veteran is qualified for a position so long as he can satisfy the physical demands." Petty's Opposition, p. 9. As discussed below, however, to the extent the Sixth Circuit considered the issue of "qualifications" as distinct from the prerequisites "specified in § 4312," it only did so in the context of "physical qualifications."

By way of background, and as set forth above, the Sixth Circuit held that Petty was entitled to be reemployed as a police sergeant because he satisfied the prerequisites set forth in Section 4312. *Petty*, 538 F.3d at 443. Furthermore, the Court held that, because Petty had satisfied the prerequisites set forth in Section 4312, the Metropolitan Government had no basis to question his qualifications. *Id.* To the extent the Sixth Circuit addressed the issue of "qualifications" as distinct from the prerequisites "specified in § 4312," it did so in the context of "physical qualifications," stating:

> Metro does not question Petty's physical qualifications; instead, it questions only whether his conduct during his military service would disqualify him from returning to service in the police department. But Petty's separation from military service is classified as "under honorable conditions," which Congress has made clear suffices to qualify him for USERRA benefits.

Id. at 441.[2]

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2. As discussed in the Metropolitan Government's initial brief, its position in this litigation was, and is, that Petty's *dishonesty* when he returned from military leave renders him unqualified to serve as a police officer. *See* Petition for Writ of Certiorari, p. 30. In fact, the Court of Appeals recognized this point later in its opinion, stating: "Metro argues *only* that it did not violate § 4313 because, perhaps having been *dishonest* in the return-to-work process, Petty may not be qualified to hold these positions." *Petty*, 538 F.3d at 444 (emphasis added).

In light of the Sixth Circuit's conclusion that "Petty was entitled to reemployment under §§ 4312 and 4313" immediately upon satisfying the prerequisites "specified in § 4312," it is being generous to state that the Sixth Circuit acknowledged "physical qualifications" as potentially limiting a returning veteran's right to reemployment. But even if the Sixth Circuit acknowledged "physical qualifications" as potentially limiting a veteran's right to reemployment, its analysis of the "qualification" issue is incomplete. USERRA defines "qualified" as "having the ability to perform the essential tasks of the position." 38 U.S.C. § 4303(9). The Department of Labor's interpretive guidance clarifies that whether a task is essential depends, at least in part, upon the employer's judgment. *See* 20 C.F.R. 1002.198(a)(2). Yet the Sixth Circuit wholly rejected the Police Department's judgment as to what qualifications are essential for police officers. In so doing, the Sixth Circuit departed from the text of USERRA and it created a circuit split on the issue. *See Lapine v. Town of Wellesley*, 304 F.3d 90, 103 (1st Cir. 2002); *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 792 (2d Cir. 1997).

The Sixth Circuit's decision conflicts with USERRA; it conflicts with the Department of Labor's interpretative guidance; and it conflicts with the First Circuit's decision in *Lapine* and the Second Circuit's decision in *Preda*. Furthermore, the Sixth Circuit's decision has the potential to endanger the public. For these reasons, the Metropolitan Government respectfully requests plenary review of this matter.

III. This Case is in an Ideal Posture for Review by the Supreme Court

Finally, Petty argues that this Court should decline to review this case because the Sixth Circuit's decision does not constitute a final order. *See* Petty's Opposition, pp. 14-17. As noted in Wright & Miller, however, "[i]n a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment." 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, pp. 29-30 (2d ed. 2008) (collecting cases).

In this case, the Metropolitan Government seeks review of the Sixth Circuit's decision on Petty's reemployment claim. The District Court granted summary judgment for the Metropolitan Government, holding that the Police Department's return-to-work process did not violate USERRA. The Sixth Circuit reversed the entry of summary for the Metropolitan Government and directed entry of summary judgment for Petty, holding that the Police Department's return-to-work process did violate USERRA. *Petty*, 538 F.3d at 441-442. The Sixth Circuit remanded the case to the District Court "with instructions to enter summary judgment in favor of Petty on the reemployment claims and to determine the resultant damages . . . ." *Id.* at 448.

The only thing left for the District Court to do with Petty's reemployment claim is determine the appropriate damages. There is no substantive analysis left. Accordingly, this claim is in an appropriate posture for review.

CONCLUSION

The Sixth Circuit's conclusion that the Metropolitan Police Department is precluded from applying any return-to-work process to returning veterans is inconsistent with the text of USERRA. Furthermore, the Sixth Circuit's interpretation of "qualified," as that term is used in USERRA, is inconsistent with the Department of Labor's regulations interpreting this term and creates a circuit split on the issue.

Congress did not intend for USERRA to elevate a returning veteran's right to reemployment above the public's right to a police force that is mentally, physically, and temperamentally qualified. But that is the status of the law under the Sixth Circuit's decision. Because this case raises exceptionally important issues, the Metropolitan Government respectfully requests that this Court grant plenary review of this matter.

Respectfully submitted,

SUE B. CAIN
Director of Law
JAMES L. CHARLES
Associate Director of Law
KEVIN C. KLEIN*
Assistant Metropolitan Attorney
DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
TENNESSEE
P.O. Box 196300
108 Metropolitan Courthouse
Nashville, Tennessee 37219-6300
(615) 862-6341

Attorneys for Petitioner

* *Counsel of Record*